IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-122

ROYAL W. SIMS AND THE R. W. SIMS TRUST,
Petitioners,

v.

WESTERN STEEL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on March 25, 1977, in Appeal Nos. 75-1849 and 76-1703, entitled *Royal W. Sims and the R. W. Sims Trust* v. *Western Steel Company.*

OPINIONS BELOW

The unreported opinion of the court of appeals is reprinted in Appendix A. The opinions, orders and findings of fact of the United States District Court for the District of Utah are reprinted in Appendix B.

An unreported partial summary judgment was ordered by the district court and was entered December 20, 1974. The district court entered an opinion on September 23, 1975 which is reported at 403 F. Supp. 450 (D. Utah 1975), and the district court's unreported findings of fact were entered May 8, 1976.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit (Appendix A) was entered on March 25, 1977. A timely motion for extension of time to file this petition was granted by Mr. Justice White on June 11, 1977, the time being thereby extended until July 21, 1977 (Appendix C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

An important question of judicial administration is presented in this case. A serious problem exists in the federal courts in Utah. Judge Willis W. Ritter, Chief Judge of the U.S. District Court, District of Utah and various judges of the Tenth Circuit Court of Appeals have become embroiled in a bitter personal controversy that adversely affects the rights of litigants in those federal courts. The petitioners here are among the unintended victims of that skirmish. As stated in Judge Ritter's attached affidavit, the judicial process in the Tenth Circuit is "eroding badly" (Appendix D, at 1a). The situation "seriously threatens the ability of parties who have tried cases in [Judge Ritter's] court to receive fair and impartial justice on appeal." *Id.*

The present case presents the following questions:

1. Can personal animosity on the part of judges of a circuit court of appeals towards a district judge, combined with an apparent effort on the part of the circuit court to discipline the district judge by summarily reversing his opinions, create the appearance and fact of bias on the part of the circuit court with respect to appellees from the district court's judgments? If so, does this appearance of prejudice violate the right to due process of appellees from judgments by the district court? Does it abrogate the high standards of fair and impartial justice that this Court, as supervisor of the federal judiciary, has established for the federal judicial system?

2. What procedures should a circuit court of appeals follow in disposing of individual cases appealed from a "problem" district court, without transgressing the rights of an appellee from that court?

3. Can an appellate court, despite the unambiguous meaning of Rule 8(c), Fed. R. Civ. P., consider the affirmative defense of release as well as the evidence purporting to constitute such release when the defense had not been pleaded, and when the release document had never been admitted into evidence?

4. Can a court, on appeal, ignore the findings of fact made by the district court judge and circumvent the mandate of Rule 52, Fed. R. Civ. P., by substituting its own findings of fact and rulings by reliance upon evidence not a part of the record on appeal?

STATUTORY PROVISIONS INVOLVED

In pertinent part, the following statutes are involved in this petition:

28 U.S.C. § 291(a):

> The Chief Justice of the United States may designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit where the need arises.

28 U.S.C. § 455:

> Interest of justice or judge
>
> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

28 U.S.C. § 144:

> Bias or prejudice of judge
>
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Rule 8(c), Fed. R. Civ. P.:

> Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively . . . release, . . . waiver, and any other matter constituting an avoidance or affirmative defense.

Rule 52(a), Fed. R. Civ. P.:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgement shall be entered pursuant to Rule 58; . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT OF THE CASE

Introduction

This is a patent infringement case. As such it would not ordinarily warrant the attention of this Court. But this is a case with a difference. The present litigation is an example of a festering sore on the body of the federal judiciary. It is a sore that discreet handling has kept from the scrutiny of this Court. The present petition urges the Court to take a look; to exercise its responsibility for supervising the lower federal courts by reviewing this case and providing guidance to the lower courts on how to deal with deplorable personal conflicts between judges at different levels of the judicial system which can adversely affect the rights of litigants.

Petitioners have interests in a patent that was the basis for their recovery of a substantial judgment rendered by the Chief Judge of the District Court for the District of Utah. Their recovery was literally snatched from the jaws of victory by a court of appeals bent

upon the systematic reversal of the judgments of the district court in which petitioners prevailed. After litigation which commenced with a suit against Western Steel in 1967, and which involved issues which have been litigated, settled and re-litigated over a period of 10 years, petitioners were the beneficiaries of a judgment based on 83 detailed findings of fact and conclusions of law to the effect that the defendant/respondent wilfully induced infringement of their patent and failed to abide by a contract concerning related proprietary data. Without citation of authority or indication of how the district court's findings and conclusions were "clearly erroneous" (as required under Rule 52), the decision below was reversed. Petitioners contend the judgment was reversed not because of the legal principles involved; those were relegated to a secondary role. It was reversed because the U.S. Court of Appeals for the Tenth Circuit has determined to try to remove or otherwise discipline the Chief Judge of the U.S. District Court for the District of Utah through clockwork reversals of his decisions. Every civil appeal taken from his court in 1975 was reversed; his reversal rate in all cases was three to four times the national average, or the average of cases from the other lower courts in the Tenth Circuit. As the affidavit of the district judge—willingly offered to petitioners in this case—movingly attests, appellees from his court cannot obtain justice from the court of appeals. That makes this case a very different patent infringement suit.

The Technical Facts

Petitioner Royal W. Sims is an inventor and a manufacturer of cement mixers, and is Trustee of the petitioner R. W. Sims Trust, which holds U.S. Patent No. 2,859,949 ("Sims Patent") covering a type of concrete mixer truck. Respondent Western Steel Company is a United States manufacturer of concrete mixer trucks. Respondent obtained a license under the Sims Patent pursuant to an agreement, dated December 14, 1968, which provided in part that all engineering drawings, plans, designs and specifications covering the concrete mixer trucks developed under the concept of the Sims Patent would "be returned" to Sims upon the termination of the license. In 1971, the license was terminated and respondent sold the engineering drawings, plans, designs and specifications then in its possession to Rite-Way, Inc., of Indiana, a competitor of petitioners, and failed to return them to petitioners as required under the terms of the licensing agreement. Since acquiring this material, Rite-Way has infringed the Sims Patent and, as a direct result, has acquired a substantial and profitable business in making, selling and using concrete mixers and replacement parts.

In separate, unrelated litigations, petitioners sued Rite-Way in 1973 and respondent (for the second time) in 1974, in the United States District Court for the District of Utah, Chief Judge Willis Ritter presiding, seeking damages for respondent's breach of the licensing agreement and its active inducement of Rite-Way to infringe the Sims Patent. Petitioners also sought damages from Rite-Way directly for Rite-Way's infringement of the Sims Patent.

In 1974, petitioners settled with Rite-Way by entering into a licensing agreement giving Rite-Way the right to manufacture concrete mixer trucks under the Sims Patent ("Rite-Way Licensing Agreement"). As part of the settlement, petitioner Sims executed a re-

lease releasing Rite-Way from liability with respect to infringement of the Sims Patent prior to the date of the Rite-Way Licensing Agreement.

The Sims-Western dispute was not settled and gave rise to the present action. The district court granted partial summary judgment on December 20, 1974, determing that respondent was liable to petitioners for breach of the 1968 licensing agreement. In an opinion entered September 23, 1975, the district court reaffirmed this judgment and awarded damages. The court also concluded that respondent's action was "wilful and malicious." 403 F. Supp. at 455. In its opinion of May 8, 1976, the district court also determined that respondent was guilty of inducement to infringe a patent under 28 U.S.C. § 1338(a) and 35 U.S.C. § 271 (b).

With scant citation of authority, the court of appeals reversed on both of petitioner's claims of breach of contract and inducement to infringe a patent. The court of appeals based its reversal on the breach of contract claim on its determination that the drawings Sims demanded were "produced" by Western and, although derived from notes, preliminary drawings and prototypes supplied by Sims, were not originated by, and thus subject to "return" to Sims. The court based its reversal on the claim of inducement to infringe on its conclusion that the release given Rite-Way by Sims in the Rite-Way Licensing Agreement of 1974 effectively released Western as well as Rite-Way. The 1974 release document upon which the court of appeals based its decision had neither been introduced into evidence nor affirmatively pleaded as a defense at trial as required pursuant to Rule 8(c), Fed. R. Civ. P.

None of the district court judge's 83 findings of fact and conclusions of law relating to liability and damages was found clearly erroneous by the court of appeals; they were simply ignored, contrary to Rule 52, Fed. R. Civ. P.

The Tenth Circuit Circus

The reversal of petitioners' judgment cannot be understood without a consideration of the unseemly manner in which the Chief Judge of the Tenth Circuit Court of Appeals, Judge David T. Lewis, and certain other Tenth Circuit Judges have exercised their authority to review the judgments of the district court over which Judge Ritter presides. In an effort to have Chief Judge Ritter removed as the chief judge of the district court, Judge Lewis has appeared before a Subcommittee of the Senate Judiciary Committee to testify in favor of a bill which would effect the removal. A transcript of the Subcommittee hearing is appended hereto as Appendix E. It presents as graphic a record as any available of the sorry state of affairs in the Tenth Circuit.

Granted, the picture of Chief Judge Ritter, as painted by the testimony of Judge Lewis, is an unattractive one. Judge Ritter is made to appear intractable, unjudicious, arbitrary and querulous. While the testimony offered by Judge Lewis is partially phrased in terms of the administrative qualities and abilities of Chief Judge Ritter, there are carefully woven into the testimony references to Judge Ritter's tenure as one of "constant turmoil." Judge Ritter is made to appear incapable of controlling the affairs of his court in a dignified and appropriate manner. Judge Ritter's decisions and acts are referred to as "intolerable." On

the other hand, Judge Lewis, through polished and restrained testimony, portrays himself as a patient, long-suffering chief judge, laboring under hardship and stress, bewildered, even baffled, by a "problem" district judge by whom he and his colleagues at the Tenth Judicial Council are sorely tried.

One episode well illustrates the point. In the words of the judge,

> "We [the Judicial Council] think that we've done everything that we can, formally, informally, to dilute the turmoil that has existed in Utah for a long, long time. It surfaces on minor matters, where persuasion has been effective. But we are the only circuit court that I know where we have had any district judge openly defy council orders." *Chief Judge—Grandfather Clause: Hearings on S. 1130 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee*, 94th Cong., 2nd Sess. 172 (1976) (hereafter "*Hearings*").

But an entirely different picture emerges from the testimony of Professor William J. Lockhart, a member of the faculty of the College of Law at the University of Utah, and former United States Attorney, who stated:

> "[On] the basis of the information available to me, . . . Judge Lewis's comments about defiance of the 10th Circuit's orders were . . . overdrawn. My recollection of your hearing is that he implied there had been frequent or general defiance of Circuit orders, but that he cited only one example: a dispute arising from reallocation of pending cases at the same time the other judge on the Utah district bench resigned to accept senior judge status and was replaced by Judge Anderson.

* * *

> "Far from evincing an attitude of defiance or disregard of legal authority and principle, that problem was handled wholly as a dispute of legal principle. The difficulty arose because the Circuit rule for allocation of the cases in the District of Utah simply had not provided for reallocation of cases upon the retirement of a sitting judge. . . . [It] was therefore necessary for Judge Ritter to exercise the residual powers of Chief Judge in that narrow situation to provide for proper assignment of those cases. It was made very clear to the Circuit that we regarded the issues presented as substantive questions of importance to the role and function of the federal judiciary; and indeed, it is still my belief that we advanced the more substantial side of the dispute. (Of course that is a difficult question to resolve because the Circuit's Opinion did not explain the basis for its disposition of a number of the legal issues presented.)

* * *

> "[At] the time the Circuit's order came down, the Judge had clearly indicated his intention to petition for Certiorari to review the decision and had received no response to his motion to stay the order. Subsequently, and pursuant to his intent legally to contest the validity of the Circuit's order, he held a hearing and made certain rulings in the disputed case. But thereafter, on the very same day, he adopted an earlier telephone suggestion from Mr. Justice White (10th Circuit Justice) by reconsidering his rulings and agreeing with Judges Lewis and Anderson that the dispute should be settled by reassignment of the disputed case to a judge from another district—a resolution which he promptly implemented with orders first staying his rulings, then rescinding them. Far from

reflecting the hardened defiance suggested by Judge Lewis, then, Judge Ritter's approach to this matter involved appropriate and substantial legal steps to contest the matters on the merits and complete disavowal of any action that could have been construed as defiant." *Hearings* at 227-228.

However, it is Judge Lewis who sits on the court of appeals. And his antagonism has also been manifested by Judges Breitenstein and McWilliams, thus affecting one third of the active or active and senior judges on the Tenth Circuit, at least one of whom is virtually bound to be a member of any panel hearing cases appealed from Judge Ritter's court. (Judge McWilliams was on the panel in this case.) The affidavit of Judge Ritter (Appendix D) is informative in this regard.

As Judge Ritter notes, his decisions are being reversed on appeal an inordinate percentage of the time. In 1975, ten of Judge Ritter's decisions in civil cases were appealed to the Tenth Circuit; all ten were reversed in whole or in part. Of 312 cases decided by Judge Ritter between 1949 and 1975, fifty-eight percent of the civil cases which were appealed were reversed, as well as forty percent of the criminal cases and an incredible seventy-six percent of the *habeas corpus* cases. *Hearings* at 17.

By contrast, in the year ending June 30, 1976, 17.9% of all cases disposed of by all of the U.S. Circuit Courts of Appeals were reversed and 17.6% of all cases disposed of by the Tenth Circuit Court of Appeals were reversed.[1]

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[1] *Annual Report of the Director of the Administrative Office of the U.S. Courts 1976*, 276-277. (Hereinafter, the "*Annual Reports*".)

During the past ten years, the highest average rate of reversal for all circuits was 21.6% in 1968, and the highest average rate of reversal for the Tenth Circuit was 20.9% in 1966.[2] The rate of reversal of Judge Ritter's opinions is far above both the national average and the average for the Tenth Circuit.

If the Court grants this petition, petitioners have been advised that the Administrative Office of the U.S. Courts will be in a position to obtain substantially more detailed statistics concerning the performance of the U.S. District Court of Utah, at least for the past five years. They should verify the impressions already clearly attainable from the information available now.

It is interesting to note that while Judge Ritter sat by designation within the Ninth Circuit for six years, no remotely comparable reversal rate existed. Further, his rate of reversal increased dramatically only in 1970, when Judge David T. Lewis was appointed Chief Judge of the Tenth Circuit. In fact, from 1970 to 1975, Judge Ritter was sustained in only 34 decisions, and reversed in 71 decisions by the Tenth Circuit for an incredible 67% reversal rate. Prior to 1970, Judge Ritter's reversal rate was 45%.[3]

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[2] *Annual Reports, supra* for years 1966-1976, inclusive. *See* Appendix F.

[3] According to statistics gathered by George Speciale, Esquire, of Salt Lake City, Utah, from his examinations of records maintained by the Salt Lake City Office of the Attorney General, State of Utah, Judge Ritter had 186 cases appealed to the Tenth Circuit Court of Appeals between 1949 and 1969, of which 85 were reversed by the circuit court on appeal for a 45% reversal rate. Between 1970, when Judge Lewis was appointed Chief Judge of the Tenth Circuit Court of Appeals, and 1975, 105 cases were appealed from Judge Ritter's court and Judge Ritter was reversed in 71 cases, for a 67% reversal rate.

By comparison, when this Court has had occasion to review cases arising from Judge Ritter's court, Judge Ritter has done fairly well. Of the six cases petitioners have identified as within this group, the Tenth Circuit had on each occasion reversed Judge Ritter's decision. However, four of the Tenth Circuit's judgments were again reversed by this Court, and Judge Ritter's decisions reinstated.[4] A fifth case was remanded to Judge Ritter's court. Only in the sixth was the Tenth Circuit's reversal of Judge Ritter sustained.[5]

REASONS FOR GRANTING THE WRIT

1. THE SITUATION IN THE TENTH CIRCUIT CREATES THE APPEARANCE OF PREJUDICE WHICH VIOLATES THE PETITIONERS' RIGHT TO DUE PROCESS.

This Court, as well as lower courts, has remained acutely sensitive of the need to provide litigants in *any* United States federal tribunal with a fair, complete and impartial hearing before judges who are free of

[4] *Robertson* v. *U.S.*, 343 U.S. 711 (1951), *rev'g* 190 F.2d 680 (1951); *Gordon* v. *U.S.*, 347 U.S. 909 (1953), *vacating* 203 F.2d 248 (1953); *Hatahley* v. *U.S.*, 351 U.S. 173 (1955), *rev'g* 220 F.2d 666 (1955); *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967), *aff'g* 349 F.2d 122 (1965); *Harless* v. *Turner*, 404 U.S. 932 (1971), *rev'g apparently unreported opinion in the court below; G.M. Leasing Co.* v. *U.S.*, 429 U.S. 338 (1977), *rev'g* 514 F.2d 935 (1975).

U.S. v. *El Paso Natural Gas*, 376 U.S. 651 (1964) is not included in the statistics, as that case was appealed directly to the Supreme Court from the district court. The Supreme Court reversed Judge Ritter in that case.

[5] Although not directly relevant to petitioners' own case, Judge Ritter's affidavit makes the added point that the unseemly reversals of his judgments tend to render the federal district court in Utah an object of ridicule and contempt, thus inhibiting potential litigants from exercising their right of access to that court.

prejudice and bias. *See, e.g., Commonwealth Coatings Corp.* v. *Continental Casualty*, 393 U.S. 145, 150 (1968); *In re Murchison*, 349 U.S. 133 (1954); *Amos Treat and Co.* v. *Securities and Exchange Commission*, 306 F.2d 260, 267 (D.C. Cir. 1962).

For example, in *In re Murchison*, the Court held violative of due process a procedure whereby a judge, acting pursuant to state law as a so-called one-man grand jury, charged witnesses for contempt and then, in his capacity as a trial judge, tried and convicted them of the contempt charge. The Court held that a trial by a judge who has an interest in the outcome is not a fair trial, noting:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" 349 U.S. at 136.

In this case, District Judge Ritter has stated in a sworn affidavit that an appellee from his court cannot get a fair hearing on appeal. He has found several judges of the circuit court so close-minded that they presume error and reverse, almost as a reflex, any judgment rendered. The panel in this case gave so little consideration to the transcript of the case that in its haste to reverse, it clearly erred as a matter of law in relying almost entirely on an unpleaded affirmative defense.

This case provides the Court with the previously unresolved issue of whether animosity—real or perceived—on the part of the circuit court judges towards a judge of a district court within that circuit violates the due process rights of a litigant to an unbiased hearing on appeal. If, as petitioners maintain, such animosity can create the appearance of bias, in violation of a litigant's right to due process, the party cannot protect his rights in any way except by appeal to this Court. No remedy is provided by statute, since the mandatory recusal statute, 28 U.S.C. § 144 (and its predecessor, 28 U.S.C. § 25), has been held inapplicable to judges of the United States Circuit Courts of Appeals. *Duke* v. *Committee on Grievances of the Supreme Court,* 82 F.2d 890 (D.C. Cir. 1936); *Millslagle* v. *Olson,* 128 F.2d 1015 (8th Cir. 1942).

28 U.S.C. § 455 is a recusal statute which does apply to all federal judges. But as elaborated described by Mr. Justice Renquist, it only makes recusal *voluntary. Laird* v. *Tatum,* 409 U.S. 824 (1972). Section 455 also fails to cover the circumstances of this case, since the situations in which a judge may recuse himself are spelled out in the statute and bias against the trial judge is not one of the situations specified. 28 U.S.C. § 455. Petitioners' only effective remedy for violation of their right to due process is to seek review by this Court.

2. AS SUPERVISOR OF THE FEDERAL JUDICIARY, THE COURT SHOULD RESOLVE THE SITUATION IN THE TENTH CIRCUIT BY PROVIDING GUIDANCE FOR HANDLING "PROBLEM" JUDGES.

An intolerable situation exists in the Tenth Circuit. Whether or not Judges Lewis, McWilliams and Breitenstein are in fact biased against Judge Ritter and are therefore inclined to reverse decisions from his court, the 67% average reversal rate of Judge Ritter's decisions since 1970, when Judge Lewis became chief judge of the circuit court, as well as the strong opinion of Judge Ritter that an appellee from his court cannot get a fair and impartial hearing on appeal, creates the appearance of bias. In the past, this Court has been quick to intervene in cases where there appeared to be bias in the judicial system. *In re Murchison,* 349 U.S. 133 (1954); *Offutt* v. *United States,* 348 U.S. 11 (1954); *McNabb* v. *United States,* 318 U.S. 332 (1942).

As the supervisor of the federal judiciary, the Court has a duty to intervene when the judicial machinery in a circuit has broken down. *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217, 225 (1946). The only appropriate vehicle by which the Court can exercise its supervisory power is a case or controversy. U.S. CONST., art. III, § 2.

Once this Court has granted this petition for certiorari, the Court has several options on how to proceed, in addition to the option of hearing this case. For example, the Court could appoint a special master to examine the situation in the Tenth Circuit and recommend a solution. Alternatively, the Court could reverse and remand for a hearing before a new panel appointed by the Chief Justice under 28 U.S.C. § 291(a) and composed of circuit judges from a circuit other than the Tenth Circuit.

3. THE COURT SHOULD CONSTRUE THE RIGHT OF A COURT OF APPEALS TO CONSIDER THE AFFIRMATIVE DEFENSE OF RELEASE WHEN THE DEFENSE IS NOT PLEADED AT TRIAL.

It is clear that an unpleaded affirmative defense is waived if not pleaded at trial in a timely manner. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971). However, this Court has never addressed the somewhat narrower issue of whether a court of appeals may consider such an affirmative defense when raised by an appellee for the first time on appeal but not even pleaded at trial.

In this case, respondent attempted to introduce into evidence at trial a document purporting to release it from liability to petitioners. Introduction of the document was objected to during the first hearing (on the breach of contract issue) on the ground that the defense of release had not been affirmatively pleaded as required by Rule 8(c), Fed. R. Civ. P. Respondent was given the opportunity to amend its pleadings and failed to do so. Consequently, the trial court sustained petitioners' objection to the admission of the release document. More than a year later, at the hearing on petitioners' claims that respondent induced infringement of their patent, respondent moved to amend its pleading to include the defense of release. The court declined to grant respondent's then belated motion to amend its pleadings. Respondent nevertheless again attempted to introduce the release document into evidence. Petitioner again objected and was sustained on the ground that release had not been pleaded.

On appeal, the Tenth Circuit issued its opinion reversing the district court, basing its decision almost

entirely on the so-called release. Not only was this an improper disregard of the Federal Rules of Civil Procedure; much more vitally, it denied petitioners the opportunity to present the numerous defenses they believe they could properly invoke to demonstrate that the alleged release is neither in law nor fact what respondent contends. As they believed the issues relating to release were excluded from the case, they addressed them neither at trial nor on appeal. This unwarranted injection of what turned out to be a dispositive issue at the appeal level also violated petitioners' right to due process and constituted so egregious a departure from established procedures as to require the intervention of this Court.

4. THE COURT SHOULD DETERMINE THE LIMITATIONS IMPOSED BY RULE 52 UPON THE REVIEW BY CIRCUIT COURTS OF APPEALS OF THE FINDINGS OF DISTRICT COURTS.

While the findings of fact of a U.S. District Court shall be accorded great weight by a Court of Appeals (Rule 52, Fed. R. Civ. P.), it is accurately reported in the notes to the Rule in the U.S. Code Annotated that the Rule has never been given authoritative interpretation by the Supreme Court. In the present case, the trial court was incensed by what was perceived as a vengeful action by respondent in handing over to the plaintiffs' competitors a great body of technical information, virtually without cost and in apparent disregard of its contractual obligations to petitioners. The court of appeals, with no record citations, purported to review the same evidence but found nothing improper in respondent's actions. While obviously reasonable men may differ even on a record such as was made here, this Court has never instructed the courts

of appeals of the extent by which a district court's equitable findings must be accepted under Rule 52 unless demonstrably "clearly erroneous."

CONCLUSION

This is an unpleasant case for the Court. As stated at the outset, it brings before the Justices an unseemly sore in the system that only this Court can effectively remedy. The Court should grant the requested writ to bring the record before it and then consider appropriate corrective steps: review, referral to a master, or remand to an unbiased panel of judges from outside the circuit. To leave the status quo in the Tenth Circuit relegates appellees from the Utah District Court to a situation in which they are either without due process or without effective recourse to the federal judicial system.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 75-1849 and 76-1703

ROYAL W. SIMS and the R. W. SIMS TRUST,
Plaintiffs-Appellees,
v.
WESTERN STEEL COMPANY, *Defendant-Appellant.*

Appeal from the United States District Court for the District of Utah, Central Division (D.C. No. C-74-131)

John A. Young, 127 West Berry Street, 709 Commerce Building, Fort Wayne, Indiana 46802 (Robert D. Maack of Watkiss & Campbell, 315 East Second Street South, Salt Lake City, Utah 84111, on the brief), for Plaintiffs-Appellees.

George M. McMillan of McMillan and Browning, 1020 Kearns Building, Salt Lake City 84101 (Ted Boyer of McMillan and Browning, on the brief), for Defendant-Appellant.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.
DOYLE, Circuit Judge.

Defendant-appellant seeks reversal of judgments entered by the United States District Court for the District of Utah on September 23, 1975, and on May 28, 1976. In the first of these partial summary judgment was entered growing out of the alleged breach of license agreement executed in 1968 by plaintiff-appellee, Sims, and defendant-appellant, Western Steel Company. The provision of the license agreement which the court held was violated and which was the basis for damages provided:

> All engineering drawings, plans, designs and specifications concerning the forward discharge transit concrete mixers within the concept of patent rights of Licensor under this patent shall be, upon termination of the license as provided herein, *returned* to Licensor at the date of termination.

The court found that there was not only a failure to return some plans and drawings, but that defendant had also made these available to a patent infringer, Rite-Way, Inc. of Indiana. On this account judgment was entered against Western in the amount of $191,426 for compensatory damages, $150,000 for conversion of trade secrets, $100,000 for punitive damages and costs and attorney's fees.*

Western's evidence disputes that any Sims drawings were delivered to it. Thus, Western claims there were none to be returned. It claims to have developed its own drawing and design information in the course of manufacturing, assembling and fitting the component parts. Western's position is that the drawings which it made were plans translating the patent concept into a workable vehicle and that it committed no wrong in sending these to Rite-Way of Indiana.

The other case grew out of Western's alleged inducement of Rite-Way to infringe U.S. Patent No. 2,859,949

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* The trial court found that Western had sold the shop drawings to Rite-Way for $109.31. This was a faulty premise. The record shows that these drawings were not sold for $109.31 or any other sum. Instead, Western charged Rite-Way $109.31 for reproducing 231 of Western's drawings ($.46 per print). Even, however, if there had been a sale it would be impossible to conceive of this giving rise to the imposition of a two million dollar plus judgment against Western, particularly since there is no showing that Rite-Way made any significant use of the drawings; that Sims suffered any loss as a result of the delivery; that these were in truth trade secrets; or that they had property value of any sort.

covering a concrete mixer truck (forward discharging vehicle), in which Sims and the Sims Trust claimed ownership. It was found and determined at trial that Western had induced the Rite-Way of Indiana infringement and that this grew out of the same delivery of drawings. The court further held that Western was responsible for all of the lost profits of Sims measured by the total reserved royalties of Rite-Way, Inc. of Indiana, which sum was $491,000. The court went on to hold that on a finding of bad faith on the part of the party infringing (or inducing), the damages can be trebled. It proceeded to treble $491,000. It awarded attorney's fees in addition.

Sims had demanded from Western $491,000. This was the exact sum which represented the total royalty obligation of Rite-Way of Indiana. A large part of this was paid to Sims by Rite-Way as a result of a settlement agreement. The $491,000 alleged loss of profits to Sims was attributable to failure of Rite-Way of Indiana to pay royalties over a long period of time. These were transactions with which Western had no connection whatsoever. Western at best was connected with but one transaction, the furnishing of some shop drawings to Rite-Way of Indiana.[1] On its face, then, the gross disproportionateness of the award is apparent.

The mentioned settlement concluded between Sims and Rite-Way of Indiana provided for Sims to receive $360,000 in full settlement of all claims for royalties (which amounted to $491,000) against Rite-Way of Indiana. All

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[1] The only sales of Rite-Way, Inc. which could possibly have been attributed to conduct of Western were those involving so-called three-axle vehicles. The maximum number of these manufactured by Rite-Way, Inc. after delivery of the drawings was twelve. The remaining vehicles for which Rite-Way owed royalties, four and five-axle vehicles, were manufactured before and after 1971. The maximum amount of royalties attributable to Western, if it were shown to have been responsible, would have been $18,000 ($1,500 per three-axle vehicle).

lawsuits between them were thereby settled and all differences were resolved. This was participated in by Moran Tank Company which was also responsible for the debts of Rite-Way, Inc. of Indiana. A judgment evidencing this settlement was entered on February 4, 1974, by the same district court in another action which was on file between Sims and Rite-Way of Indiana (and Moran).

One of the arguments advanced by Western is that this unconditional release of Rite-Way, Inc. of Indiana precludes *any* recovery against Western. The theory is that the release followed by a complete settlement evidenced by the entry of judgment for the full amount determined owing from Rite-Way, the direct infringer, operates in law to close the door to any supplemental recovery for the same acts from Western on the alleged theory of inducement of infringement.

It is important to identify Rite-Way, Inc. of Indiana and other participants. In these complex dealings Sims gave a license to Rite-Way, Inc. of Indiana commencing in 1967 to manufacture four and five-axle concrete mixer trucks. This arrangement continued to 1971. On February 28, 1972, but retroactively effective June 12, 1971, Sims entered into a written contract with Beta Corporation, which is not here joined, whereby the latter acquired from Sims all the rights to the patent. Beta had entered into a license agreement with Rite-Way, Inc. of Indiana, effective July 1, 1971, giving that corporation the limited right to manufacture three, four and five-axle models of the patented invention. This agreement also authorized Rite-Way of Indiana to manufacture replacement parts for forward discharge concrete mixer vehicles which had been previously manufactured and sold. By its terms it ended August 31, 1971, although Rite-Way of Indiana continued to manufacture vehicles and to maintain a royalty reserve.

Beginning in 1970, Rite-Way, Inc. of Indiana went through Chapter XI of the Bankruptcy Act. Later, Moran

Tank Company, Inc. took over Rite-Way, and from the accounts available, Moran also went into bankruptcy in 1974. During the period of the Moran custody a settlement between Rite-Way of Indiana (and Moran) and Sims occurred.

In the period following the 1968 agreement between Sims and Western, Western had a number of conferences with Rite-Way of Indiana dealing with a possible merger of the two companies. One such conference was in August 1969, at which time one Limbaugh, a purchasing agent of Rite-Way and later General Manager, visited the Western Steel Company facilities in Utah and took back with him customer lists and lists of assets of Western. A dispute exists as to whether Western furnished servicing and manufacturing information contained in two trial exhibits at this time. Western denies that it did so, and there is no evidence in the record that they gave anything except customer lists, vendor lists and some parts descriptions.

Two Rite-Way of Indiana employees, Bowen and Borden, testified during the trials. Bowen said that the drawings were invaluable to Rite-Way of Indiana and that the company profited by having them.[2] As to the customer and vendor lists that Judge Ritter referred to in his findings as being a source of damages, Bowen merely said that he assumed they were used because he saw Limbaugh's trip report referring to them in the company files. He also stated that Rite-Way of Indiana got in the three-axle mixer business after receiving the drawings in 1971. He, however, was not with Rite-Way at the time that the report was written in 1969, nor was he with them afterwards until 1972. Bowen died before the trial on the inducement of patent infringement issues. Borden, who was also general manager of Rite-Way of Indiana, testified at that trial. He

[2] This characterization was the only evidence that the drawings were of any value.

said that when he left Rite-Way in 1970, the company did not have the technical know-how provided by the detailed drawings. On specific questioning by Judge Ritter he said that he did not have personal knowledge about the circulation of the drawings around the manufacturing plant.

Western's division manager testified that the only reason he sent the drawings to Rite-Way of Indiana was because it (Western) was phasing out the manufacture of the vehicles and wished to have someone manufacture replacement parts for the 100 or more vehicles which it had manufactured and sold. Western also had offered testimony of an engineer, one Emke, saying that the detailed drawings could not have been used in the manufacture of the three-axle vehicles produced by Rite-Way of Indiana.

There exists a dispute about the failure of the trial court to receive the deposition of Limbaugh. In that deposition he stated that his company had not used the drawings obtained in 1971 for the purpose of manufacturing new trucks; that they had made their own drawings as they built trucks; and that they had built the initial three-axle trucks prior to receiving the drawings. He stated that some of the drawings were used in the manufacture of one replacement part, the chute. No justification for refusal to take this deposition is apparent since it was relevant and all formal requisites were satisfied.

Another disputed item of evidence is a statement given by Borden, which was attributable to Bowen who had since died, that Rite-Way had acquired all of Western Steel's technical knowhow relating to the manufacture of three-axle trucks. The court received this rank hearsay pursuant to Rule 804(b)(5), Fed. Rules of Evid.

THE CONTENTIONS OF WESTERN IN CASE NO. 75-1849, THE ACTION FOR BREACH OF THE LICENSE AGREEMENT

Western's contentions are that:

First, the court erred in not dismissing Sims' action because it is not a case arising under federal law; it is merely a suit for breach of contract. It was not appropriate for the court to entertain the action on a pendent jurisdiction basis because the patent action was palpably insufficient in law and fact, and even if there was some semblance of a claim, it would not satisfy the requirements of pendent jurisdiction.

Second, there is no substantial evidence of damages to support the court's conclusions. There is a lack of proof that the delivery of drawings to Rite-Way produced any damage to Sims caused by the alleged breach of license agreement or conversion of trade secrets.

Third, there is no legal basis whatever for awarding punitive damages.

Four, the award of attorney's fees was wholly without basis.

II.

THE CONTENTIONS OF WESTERN IN CASE NO. 76-1703, THE SUIT FOR INDUCEMENT OF PATENT INFRINGEMENT

Western's contentions here are that:

First, it was error to refuse to hold that the Beta Corporation was an indispensable part, under Rule 19(a), since it was shown to have a vital interest in the lawsuit.

Second, the patent was invalid because of the vagueness and indefiniteness of the claims.

Third, there was a lack of evidence that the principal infringer, Rite-Way of Indiana, in fact infringed. Failure

to prove this is fatal to the inducement to infringe claim, for this is an essential prerequisite.

Fourth, the evidence was insufficient to establish that there was inducement to infringe by Western.

Fifth, there was lack of evidence that the drawings furnished by Western had anything to do with infringement by Rite-Way.

Sixth, the award of damages in the sum of $491,000, together with trebling, had no support in the record.

We need not discuss in detail all of the issues listed above. We limit our opinion for the most part to: first, whether the release of Rite-Way, Inc. by Sims without any reservation of right provision as required by Utah law precludes prosecution of an action against Western; second, whether there is jurisdiction to entertain the action for alleged breach of the license agreement; and, third, whether the license agreement covenant to return drawings, etc., was violated.

III.

But first, since we are concerned with the lack of merit of all these claims, we deem it necessary to comment briefly on those that are not discussed in detail in Parts IV, V and VI.

A. *Liability for Breach of License Agreement and for Conversion of Trade Secrets*

The issues of breach of license agreement and conversion of trade secrets are closely intertwined. Although the license agreement question is dealt with in detail in Part VI, it is therefore helpful here to discuss enough of the common facts to show why the court's trade secrets finding was meritless.

The plaintiff's complaint alleges a breach of license agreement. The contested license provision calls for a return to the licensor on termination of the license of all drawings, plans and specifications concerning the forward discharge transit mixers. The court, in addition to finding a breach of the license agreement, found on its initiative that the documents or information delivered by Western to Rite-Way of Indiana contained trade secrets which were forbidden to be so delivered.

There is merit in Western's argument that this license agreement did not impose an express prohibition against sending these drawings. Rather, it addressed itself in pinpoint fashion to documents that had been furnished to Western by Sims and were Sims' property. We are told now, and it is not seriously disputed, that the drawings furnished to Rite-Way were prepared by Western in the course of the practical adapting of the patent to the manufacture of the product. Hence, even if one were to imply the promise not to submit drawings, plans, designs and specifications furnished by Sims, the language of this stipulation would not cover the kinds of drawings or information that were furnished.

Further, it was not as if these items were forwarded to a competitor who was on the outside of transactions with Sims. Rite-Way of Indiana had been involved with this product since 1967 and the drawings were forwarded in 1971. True, there had been some changes. Beta Corporation had purchased the patent rights in the intervening period and had extended a license to Rite-Way of Indiana, but Rite-Way had constructed three-axle vehicles before and during this period, had never ceased to do so, and the only thing that was in controversy was the payment of royalties.

The terms of the Beta—Rite-Way of Indiana license agreement provided that it would expire August 31, 1971, if not extended in writing. Thus, the earliest the license

would have expired was August 31, 1971. There is no reason to believe that Western was aware of this.

Since Rite-Way of Indiana had been in the business, it is hard to see how these could have been trade secrets. And because Rite-Way of Indiana had had a license any trade secrets should have been published thereby. That is what a patent and a license agreement are all about. So it is incongruous to talk about trade secrets in this context. The award for conversion of trade secrets is therefore vacated.

Finally, we are at a loss to explain the award of $100,000 exemplary damages. Since the record reveals nothing to justify a finding that Western acted maliciously, the manifest weight of the evidence is to the contrary.

B. *The Issue as to the Merits of the Claim for Relief on Inducement of Patent Infringement*

As previously noted, the injury inflicted here could have, in view of the time factor, affected only 12 three-axle vehicles.

Section 271(b) of Title 35 U.S.C., is the applicable section. It provides that: "[w]hoever actively induces infringement of a patent shall be liable as an infringer." There is a dearth of evidence to establish that there was an active inducement present in this case. The extent of Western's activity was the transfer of the drawings.[3] This subsection contemplates that the inducer shall have been an active participant in the line of conduct which the actual infringer was guilty of. Thus he should be in the nature of an accessory before the fact. No such activity was here shown. Furthermore, the cases require that it should have been intentional, and here again, there is a dearth of evidence on this point. To the contrary, there was strong positive evidence that there was no intent whatsoever on the part of Western to induce an infringement. Indeed the undisputed evidence was that its purpose in sending these drawings was to insure that replacement parts for three-axle vehicles would be continued by Rite-Way of Indiana in view of the fact that Western was phasing out its activity in this respect. It is seen from what has been said that the merits of this claim are uncertain and shadowy and likely non-existent.

[3] Any activity relating to the 1969 trip report is insubstantial in this regard.

C. *The Issue of Damages under the Inducement Cause*

The award of $491,000, the same being the measure of all of the royalties which were allegedly owed by Rite-Way of Indiana to Sims or Beta to compensate for the injury flowing from the giving of these drawings is so disproportionate as to be shocking. It becomes much more than shocking when the $491,000 is trebled and a commensurate attorney's fee is awarded. There is no more rhyme nor reason to this than there is in the award of the items discussed above. In our opinion, then, this is a wholly unjustified determination of liability and a grossly improper award of damages.

The measure adopted by the court, that is, the loss of royalties as between Sims and Rite-Way of Indiana, spans a long period of time, many years, and embraces manufacture of four and five-axle vehicles that were not described in the drawings furnished. The maximum that could have been affected by the drawings, assuming that the drawings were improperly furnished, would have been limited to 12 three-axle vehicles and royalties totaling $18,000.

IV.

Did the Release by Sims of the Claim Against Rite-Way, Inc. of Indiana Without a Reservation of Right to Proceed Against Western Constitute a Release of Western Also?

We have concluded that the settlement agreement did release Western. If the rule which has been adopted recently by the Supreme Court were to govern, the result might be different. In this case the parties included in the settlement agreement a stipulation providing that Utah law would govern the construction of the agreement. Paragraph 12 of the 1974 agreement states: "[t]his instrument shall in all things be governed by the laws of the state of Utah."

The Supreme Court rulings govern cases in which federal law controls the release question. The decisions enunciating the federal rule are Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476 (1964), together with Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971).

Aro was a patent infringement case in which Aro Manufacturing Company had furnished material to owners of Ford vehicles for the replacement of patented tops on convertible models. The Supreme Court held that Aro was liable for contributory infringement for supplying replacement fabrics used on vehicles that had been manufactured without a license.

1965 was the dividing line between the sale by Ford of non-licensed vehicles and the sale of licensed vehicles. A settlement agreement was reached in that year between Ford and the convertible company. Aro said that the release of Ford and its joint tort-feasors also impliedly released it, but the Supreme Court held that the release was not effective as to Aro; that a release given a direct infringer which showed an intent to save the releasor's rights

against a past contributory infringer succeeded in preserving the rights. *See* 377 U.S. at 501.

Recently, the Supreme Court has been more definitive in setting forth standards for release applicable under federal law. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971). The Court discussed and rejected two rules: 1) the common law rule that a release of one joint tort-feasor released all other parties jointly liable regardless of the intent of the parties; and 2) the rule that the release of one coconspirator normally releases all others in the absence of reservation of rights, which rule is codified in the Model Joint Obligations Act, 9B U.L.A. 355.[4]

The third rule outlined and approved in the Supreme Court's opinion in *Zenith* is that the effect of a release upon co-conspirators is determined in accordance with the intention of the parties. *See* 401 U.S. at 345. It credits the earlier *Aro* case with having adopted that rule. It also commented that the *Aro* case had refused to give the benefit of a release to the contributory infringer even where there had been no express reservation of the patent holder's rights against contributory infringers.

At bar there is not any express reservation of rights in the settlement agreement against Western or any other inducer or contributory infringer. The release contains no reference showing any intention to reserve rights nor is there any mention of Western notwithstanding that Sims was cognizant of Western's presence as was evidenced by his having reserved his rights of action against Western in connection with the sale of the patent to the Beta Corporation.

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[4] This provides that the release of an obligor including a joint tort-feasor "shall release co-obligors to the full extent of the obligor's original liability . . . unless the amount of that liability is not known to the obligee . . . or the obligee expressly reserves his rights against the co-obligors." 401 U.S. 344 n. 11.

Since this settlement agreement was not an issue which was preempted by federal law but rather was a common law matter, it was appropriate for the parties to stipulate that Utah law should govern.

As the Supreme Court's opinion noted in *Zenith*, Utah has adopted the Uniform Joint Obligations Act, 2A Utah Code Ann. Sections 15-4-1 to 15-4-7 (1953). The applicable sections are 15-4-3, 14-4-4 and 15-4-5.[5] Section 15-4-1 defines obligor as including persons liable for a tort.

An important aspect of this uniform law is to require that there be a reservation of right as to a joint obligor if the person releasing the principal is to retain rights against the joint obligor. Thus, this statute relieves the harshness of the old common law rule. *See* Melo v. National Fuse & Powder Co., 267 F. Supp. 611, 613 (D.Colo. 1967), in which the court construed the Utah statute in this manner. The *Melo* court ruled that there had been a release of a joint party where there had been no reservation of right. The court referred to Annot., 73 A.L.R.2d 403, 408 (1960), and it referred also to Greenalch v. Shell Oil Co., 78 F.2d 942 (1935), a case involving a reservation of right clause. The Tenth Circuit in that case interpreted the Utah statute as embodying the reservation of rights rule. It also recognized that the giving of a complete release without reserving a right barred an effort to bring an action against the joint party.[6]

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[5] The most important of these is Section 15-4-4 which provides:

> Subject to the provisions of section 15-4-3, the obligee's release or discharge of one or more of several obligors, or of one or more of joint or of joint and several obligors, shall not discharge co-obligors against whom the obligee in writing and as part of the same transaction as the release or discharge expressly reserves his rights; and in the absence of such a reservation of rights shall discharge co-obligors only to the extent provided in section 15-4-5.

[6] *See also* United States v. First Sec. Bank of Utah, 208 F.2d 424 10th Cir. 1953), involving the giving of a covenant not to sue. We there held that under Utah law a covenant not to sue with reservation of right did not bar an action against one who stood in the shoes of a joint tort-feasor. The Utah statute was referred to in that case.

The Supreme Court of Utah in Dawson v. Board of Education, 118 Utah 452, 222 P.2d 590 (1950), reached a like result.

We conclude that the settlement agreement between the Sims interests and Rite-Way of Indiana (and Moran) was a complete and unrestricted release of Rite-Way which contained no reservation of right and which was governed by Utah law, and, therefore, that it effectively released all rights which Sims may have had against Western.[7]

V.

Whether There Is Pendent Jurisdiction So As To Allow The Trial Court to Hear and Determine the Breach of Contract Claim, Concededly a State Action, in Conjunction With the Exclusively Federal Inducement to Infringe Claim

The guiding light on the subject of pendent jurisdiction is the Supreme Court's decision in United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). The trial court applied the *United Mine Workers* rule in holding that there was jurisdiction to consider the alleged contract violation. Sims v. Western Steel Company, 403 F. Supp. 450 (1975). This determination was made on summary judgment and without considering the substantiality of the federal claim. *Gibbs* extended somewhat the pendent jurisdiction doctrine as it had been defined in Hurn v. Oursler, 289 U.S. 238 (1933), where the doctrine had been circumscribed by the then existing cause of action concept.

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[7] Section 15-4-5 does not affect this case. It deals only with the effect of the obligee's knowledge or lack of knowledge of the released obligor's share of liability in relation to co-obligors.

The requirements set forth in *Gibbs* were, first, that the federal claim must have substance sufficient to confer subject matter jurisdiction on the court, and, second, that the state and federal claims must derive from a common nucleus of operative fact.

Finally, the court said that, considered without regard to their federal or state character, the plaintiff's claims had to be such that he would ordinarily be expected to try them all in one judicial proceeding. Then, assuming substantiality of the federal issues, there was power in federal courts to hear the entire matter. *Gibbs* thus enlarged the discretion of the trial court hearing the case to determine that pendent jurisdiction existed or did not exist.

We are hesitant to condemn in the course of the appeal the finding that the so-called federal claim has substantiality. At least it defines a claim which purports to arise under the patent laws of the United States. Thus, we are reluctant to hold that there was a lack of jurisdiction to try the state claim due to the insubstantiality of the federal claim. So we resolve our doubts and conclude that the trial court had power initially to find and determine whether it had jurisdiction over the federal claim, and also to decide whether the two claims had a common nucleus of operative fact.

It is true that the conduct relied on in both claims was the handling of the drawings by Western. The alleged injury caused in the state case is the breach of the license agreement by nonreturn of the drawings, which constitutes a state law contract action. In the federal case it is contended that the delivery of the drawings triggered patent infringement. We cannot say that these two consequences, if they existed, do not share a common nucleus. The breach of contract is an offshoot of the federal claim and within its ambit. *Cf.* Seneca Nursing Home v. Kansas State Bd. of Social Welfare, 490 F.2d 1324 (1974), and *see* Stevens v. Rock Springs National Bank, 497 F.2d 307 (1974).

VI.

Whether the License Agreement Covenant to Return Drawings, Etc. Was Violated

On December 20, 1974, the trial court held in its Partial Summary Judgment that the defendant had breached the License Agreement entered into by the parties by failing to return certain plans and drawings to the plaintiff. The relevant provision of the License Agreement found by the trial court to have been breached by the defendant provides in pertinent part that:

> All engineering drawings, plans, designs and specifications covering the Forward Discharge Transit Concrete Mixer within the concept of the Patent Rights of Licensor under this License, shall be upon termination of this License as provided herein, returned to Licensor at the date of termination . . .

(Emphasis added.)

The primary question before the trial court on the motion for partial summary judgment was: what is the plain meaning of return? Judge Ritter applied the plain meaning doctrine. The rule under Utah law is that "[i]f language of the contract is clear and not subject to more than one interpretation, the ordinary plain meaning of the words of the contract must be used." Petrof Trading Co. v. Intermountain Research and Engineering Co., 424 F.2d 704, 706 (10th Cir. 1970). Judge Ritter clearly stated that "[t]he partial summary judgment was made in reliance on the plain meaning of the word ['returned'] absent evidence of any other reasonable construction or intent by the parties at the time the agreement was signed." *Supra*, 403 F. Supp. at 454.

Judge Ritter acknowledged that he should apply the plain meaning doctrine to the term "returned," but this he failed to do. Return means that something which has had

a prior existence will be brought or sent back. This definition is supported by dictionary definitions and case law. The United States Supreme Court, in any early decision, gave this meaning to return. It stated that "'return' implies the prior existence of some state or condition." Clyatt v. United States, 197 U.S. 207, 219. A similar definition is set forth in United States v. Weiss, 34 F. Supp. 99, 100 (S.D.N.Y. 1940), where the court said "the word 'return' . . . indicates that the desired records and recordings were originally the property of the defendants, which is not the fact. It is impossible to return to them something that they have never possessed." Other courts have applied a similar definition. The Colorado Court has stated that "[t]he word 'return' in its common and accepted use means to bring back or restore, and is a recognition of a right, ownership, dominion or control of the article in one who has not the immediate possession thereof." *See* Johnson v. Hilliard, 160 P.2d 386, 389, 113 Colo. 548 (1945). It is not surprising that Black's Law Dictionary (4th ed. 1951) defines "return" as "[t]o bring, carry or send back; to place in the custody of; to restore; to redeliver; to send back." The American College Dictionary (1970) defines "return" as ". . . to put, bring, take, give, or send back . . ."

The trial court refused to so interpret the word "return." It said:

> The agreement, it seems to me, isn't open to any construction. It says all of the stuff should be returned. The use of "return" doesn't, it seems to me, limit the documents to those that on some other time were delivered to them. It is whatever you have, however you got them.

Rec. on App., Vol. I, 9. (No. 75-1849).

From the legal definitions, there can be a return only if there had been a prior delivery.

There is no evidence whatever that any of the plans or drawings sought in this action had been originally sent by Sims to Western. Melvin J. Glade, in an affidavit filed in Opposition to Plaintiff's Motion for Summary Judgment, stated that there were no drawings or written design data tendered to Western Steel Company by the plaintiffs. He stated that Western Steel did subsquently develop its own drawings and design information, but did not develop any significant concepts, patentable ideas or other information which would have enhanced the letters patent. Indeed the trial judge did not find that any drawings or plans were given to Western. In the court's opinion and order it was stated that "engineering drawings as referred to in the license agreement exist and were in the possession of the defendant." *Supra,* 403 F. Supp. at 454. When we view this finding in conjunction with his statement at trial, it appears that "return" meant something to the trial judge quite different from redelivery. In short, he did not find that property once in Sims' possession was not returned to Sims.

There is little or no showing that Sims suffered injury or damage as a result of not receiving drawings. True, Sims argues that he was harmed by not receiving the drawings because he planned to use them to make replacement parts from which he expected to make a profit. But this, a mere expression, was given after the fact. It is more significant that he never made a demand for them from Western until the trial. In a letter dated February 14, 1974, from Sims' attorney to Western purporting to be a notice of breach of the settlement agreement, Sims claimed that he was not notified of the availability of engineering drawings, plans, designs and specifications tendered by the licensee to others and that such information came to his attention just recently. If Sims had in fact intended to

manufacture replacement parts, and if Western's drawings and plans had been necessary for him to do so, it is certain he would have requested these documents long before 1974. It is equally improbable that Sims lacked knowledge of drawings and plans available since he knew that Western was engaged in manufacturing pursuant to the patent and license. Also, Sims was shown to have worked closely with Western while it was engaged in this work.

The undisputed evidence also establishes that the documents were never put out of reach of Sims because the originals were not sent to Rite-Way of Indiana. Copies were made for the use of Rite-Way of Indiana. Therefore, if Sims had really needed the drawings to build replacement parts, he could have had access to them if he had made a simple request (prior to trial). One gets the impression that this entire claim was the product of afterthought. In the face of this record we find it impossible to give any credence to the adjudication and award. In our view it must be vacated.

The judgments of the district court are reversed and the causes are remanded with instructions to dismiss both the actions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Civil No. C 74-131

Partial Summary Judgment

ROYAL W. SIMS AND THE R. W. SIMS TRUST, *Plaintiffs*,

vs.

WESTERN STEEL CORPORATION, A CORPORATION OF THE STATE OF UTAH, *Defendant*.

On Wednesday, the 27th day of November, 1974, at the hour of 2:00 o'clock p.m., the Plaintiffs ROYAL W. SIMS and R. W. SIMS TRUST's Motion for Summary Judgment, pursuant to Rule 56 F.R.C.P., came on regularly for hearing before the Law and Motion Division of the United States District Court in and for the District of Utah, Central Division, the Honorable Willis W. Ritter, District Judge, presiding. The Plaintiff ROYAL W. SIMS was present and represented by his counsel of record, JOHN A. YOUNG of Ft. Wayne, Indiana, who had been previously admitted to practice in the above entitled court for the purposes of this case, together with ROBERT D. MAACK of Salt Lake City, associate Utah counsel; the Defendant, WESTERN STEEL CORPORATION, appeared through its counsel and attorney of record, K. S. CORNABY of Salt Lake City, Utah. The court heard arguments of counsel and the arguments having been concluded, the matter was submitted for determination; the court having read and reviewed and being thoroughly advised as to the facts and information contained in the records and files herein

NOW THEREFORE, it is ordered, adjudged, and decreed as follows:

1. Liability is determined to be present and partial summary judgment as to liability alone is hereby entered in favor of the Plaintiffs and against the Defendant for breach of the License Agreement (a copy of which is attached to Plaintiff's complaint as Exhibit D).

2. Plaintiffs are entitled to recover and the Defendant is hereby ordered to surrender all drawings and information as specifically described in paragraph 8 of the License Agreement, (a copy of which is attached to Plaintiffs' complaint as Exhibit D).

3. Defendant is enjoined from transferring any of the drawings and information to any party other than Plaintiffs and shall recover and account for any drawings and information conveyed to others.

4. A separate hearing shall be set to determine the issue of damages.

5. Plaintiff and the same is hereby awarded a judgment for his costs incurred to date in bringing this action.

DATED this 20th day of December, 1974.

/s/ WILLIS W. RITTER
WILLIS W. RITTER
Chief United States
District Judge

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

ROYAL W. SIMS *and the* R. W. SIMS TRUST, *Plaintiffs*,

v.

WESTERN STEEL COMPANY, a corporation of the State of Utah, *Defendant*.

Civ. No. C 74-131

UNITED STATES DISTRICT COURT, D. UTAH.

Sept. 23, 1975.

Patent licensors brought action against licensee for infringement of patent and breach of license agreement. The District Court, Ritter, Chief Judge, held that court had pendent jurisdiction over state breach of contract claim; that licensors were entitled to judgment on the contract claim; that licensee, by refusing to return certain plans and specifications as required in license agreement and in instead selling the plans to a known competitior of the licensors, converted certain trade secrets of the licensors; that licensors were entitled to $191,000 in damages for lost profits, $150,000 for conversion of the trade secrets, and $100,000 in punitive damages.

Order accordingly.

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John A. Young, Fort Wayne, Ind., for plaintiffs.

George M. McMillan, Paul L. Badger and K. S. Cornaby, Salt Lake City, Utah, for defendant.

Opinion and Order

RITTER, Chief Judge.

The plaintiffs, Royal W. Sims and the R. W. Sims Trust, brought this action under 28 U.S.C. Section 1338(a)

(1970) [1] and 35 U.S.C. Section 271(b) (1952) [2] alleging infringement of Patent No. 2,859,949 by the defendant, Western Steel Company. Plaintiffs seek a permanent injunction against further infringement of the patent by the defendants, an accounting of all profits realized by the defendant as a result of the alleged infringement, damages and attorney fees.

I.

In December of 1968 this Court issued an order of dismissal in the matter of *Sims v. Western Steel Co.*, Civil No. C 215-67 (D.Utah, Dec. 13, 1968) pursuant to a stipulation for dismissal dated December 13, 1968. The parties also entered into a settlement agreement dated December 14, 1968 and a license agreement dated December 12, 1968. The license agreement provided in part that:

> All engineering drawings, plans, designs, and specifications covering the Forward Discharging Transit Concrete Mixer within the concept of the Patent Rights of LICENSOR under this License, shall be upon termination of this License as provided hereinabove, returned to LICENSOR at the date of termination. And further, LICENSEE shall assign to LICENSOR at the termination of this License, any and all improvements, pending applications, patents or letters patent with respect to further inventions on or in connection with the Front End Discharging Transit Concrete Mixer concept, together with all designs and blueprints relating to the manufacture and assembly thereon.

[1] 28 U.S.C. § 1338(a) (1970) reads:

> (a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patent, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

[2] 35 U.S.C. § 271(b) (1952) reads:

> (b) Whoever actively induces infringement of a patent shall be liable as an infringer.

In 1971 the defendant, Licensee, sold engineering drawings, plans, designs and specifications covering the front end discharging transit concrete mixer to Rite-Way, Inc. of Indiana.

After a hearing on plaintiffs' motion for summary judgment this Court issued an order of partial summary judgment for the plaintiffs on December 20, 1974. The order determined that the defendant is liable to the plaintiffs for breach of the license agreement.

Defendant subsequently moved to set aside the order granting a partial summary judgment on the grounds of a lack of jurisdiction and that there are issues of material fact which must be resolved before summary judgment may be granted. The factual issues asserted are: (1) whether the plaintiff is the owner of Patent No. 2,859,949, (2) whether the Patent is valid, (3) whether the defendant actively induced infringement of the Patent, (4) whether Rite-Way, Inc. utilized the materials sold them by the defendant to infringe upon plaintiffs' rights, (5) whether the settlement agreement releases and discharges any rights plaintiffs may have had against defendant as a contributory infringer of the Patent, and (6) whether the word "returned" in the license agreement obligated the defendant to deliver all drawings, plans, designs or specifications covering the forward discharging transit concrete mixer to the plaintiffs. Defendant also filed a suggestion of lack of jurisdiction.

II.

A. Jurisdiction

In suggesting a lack of jurisdiction the defendant relies on *Hurn v. Oursler*, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed.

1148 (1933), in which the Court, at 246, 53 S.Ct. at 589, distinguished

> . . . between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground;* in the latter it may not do so upon the non-federal *cause of action.*

This formula, however, has been considerably modified by the United States Supreme Court since the adoption of the Federal Rules of Civil Procedure. In *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) the Court held that:

> Pendent jurisdiction, in the sense of judicial *power,* exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .," U.S.Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co. v. Morrin,* 289 U.S. 103 [53 S.Ct. 549, 77 L.Ed. 1062].[3]

In the instant case the plaintiffs have presented two causes of action, one federal in nature and one state, de-

[3] 383 U.S. at 725, 86 S.Ct. at 1138 (footnote omitted, brackets and elipses in original).

rived from the same operative facts. The federal claim is substantial. Plaintiffs' claim of patent infringement under 28 U.S.C. Section 1338(a) (1970) and 35 U.S.C. Section 271(b) (1952) is one over which the United States District Courts have exclusive and original jurisdiction. That claim has not been dismissed or shown to be spurious. The claim has not been abandoned by the plaintiffs. Therefore this Court possesses and has properly exercised jurisdiction to hear and decide the pendent state claim.

B. Issues of Material Fact

The Court is not persuaded by defendant's assertion of numerous items of material fact which need to be decided prior to granting summary judgment for the plaintiffs on the pendent state claim.

The first four issues asserted: (1) whether the plaintiff is the owner of Patent No. 2,859,949, (2) whether the Patent is valid, (3) whether the defendant actively induced infringement of the Patent, and (4) whether Rite-Way, Inc. utilized the materials sold them by the defendant to infringe upon plaintiffs' rights, are not relevant to the partial summary judgment. These are issues of fact related to plaintiffs' federal claim of inducement to infringe on patent rights not to the pendent claim of a breach of the license agreement. Even if issues 1 & 2 were crucial to the partial summary judgment the Court has not heard any persuasive argument to indicate that the plaintiffs do not own a valid patent, No. 2,859,949.

Under the decision of the Supreme Court in *United Mine Workers v. Gibbs, supra* and the cases which have followed[4] it is not necessary for this Court to enter final

[4] *See Rosado v. Wyman,* 397 U.S. 397, 403-05, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); *Hagans v. Lavine,* 415 U.S. 528, 545-50, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Stevens v. Rock Springs Nat'l Bank,* 497 F.2d 307, 310 (10th Cir. 1974).

judgment on the federal claim prior to deciding the non-federal breach of contract claim.

Defendant's fifth issue, whether the settlement agreement releases and discharges any rights plaintiffs may have had against defendant as a contributory infringer of the patent, also deals with the federal claim. Further, on this point counsel has misinterpreted the federal cause of action. The plaintiffs have alleged that the defendant is guilty of inducement to infringe not of contributory infringement. In any case there is no indication that the settlement agreement releases and discharges any rights plaintiffs may have against defendant for a breach of contract.

Defendant's sixth issue, whether the word "returned" in the license agreement obligated the defendant to deliver all drawings, plans, designs or specifications covering the forward discharging transit concrete mixer to the plaintiffs, or only those which were delivered by the plaintiffs to the defendant prior to the termination of the license agreement, has already been ruled upon by this Court. The uncontested facts are as follows. First, the parties entered into a license agreement. Second, the agreement provided that upon termination of the agreement "all engineering drawings, plans, designs, and specifications covering the Forward Discharging Transit Concrete Mixer within the concept of the Patent Rights of LICENSOR under this License, shall be . . . returned to LICENSOR at the date of termination." Third, the license agreement has ended and been ended for several years. Fourth, engineering drawings as referred to in the license agreement exist and were in the possession of the defendant. Fifth, while demand has been made the drawings, plans, designs and specifications have never been returned to the plaintiffs.

With such uncontroverted facts before the Court it would require a contorted definition of "return" to find that the defendant has not breached the agreement. The partial summary judgment was made in reliance on the plain meaning of the word absent evidence of any other reasonable construction or intent by the parties at the time the agreement was signed.

For the foregoing reasons defendant's motion to set aside the order granting partial summary judgment is denied.

III.

Having determined that the partial summary judgment was properly granted under Rule 56(d) the question of damages remains. The case law in Utah is clear on the types and measures of damages which may be awarded in cases involving a breach of contract. The purpose of damages is, of course, to restore the plaintiffs to the position they would have been in but for the wrongdoing of the defendant. *Park v. Moorman Mfg. Co.*, 121 Utah 339, 241 P.2d 914 (1952) Once the injured party has established that some damage has been suffered it falls upon the court to determine the measure of damages. It is not necessary that the proof of damages be exact. As the Utah Supreme Court stated in *Gould v. Mountain States Tel. & Tel.*, 6 Utah 2d 187, 309 P.2d 802 (1957):

> Where the plaintiff has shown actual loss of business during the period as a result of defendant's breach of contract, he will not be denied recovery because the exact amount of damage cannot be readily ascertained. *Id.* at 192, 309 P.2d at 805 (footnote omitted).

This rule is designed to insure that a wrongdoer may not escape liability due to uncertainty of the amount of damages actually suffered by the other party.

Utah's rule regarding profits is also clear. Prospective profits from a business that has yet to be established are too uncertain and speculative to serve as a basis for recovery. *Jenkins v. Morgan*, 123 Utah 480, 260 P.2d 532 (1953); *Van Zyverden v. Farrar*, 15 Utah 2d 367, 393 P.2d 468

(1964). Where, however, damages are suffered by an ongoing business they "... need only be proved with sufficient certainty that reasonable minds might believe from a preponderance of the evidence that the damages were actually suffered." *Howarth v. Ostergaard*, 30 Utah 2d 183, 187, 515 P.2d 442, 445 (1973). In such cases lost profit as well as compensation for damage to the good will of the business may be awarded. *Trans-American Collections, Inc. v. Continental Accounting Service House, Inc.*, 342 F.Supp. 1303 (D.Utah 1972).

Punitive damages may also be awarded in such cases as the conduct is shown to be both wilful and malicious. *Trans-American Collections, Inc., supra.*

In this case the plaintiffs seek compensatory damages of $191,426.00, damages for conversion of trade secrets of $400,000.00, punitive damages of $250,000 plus costs and reasonable attorney fees.

Plaintiffs in support of compensatory damages established the following facts. Sims pioneered development of a three-axle mixer which in 1968 he licensed Western to manufacture under the license agreement previously discussed. At that time a third company, Rite-Way, Inc. of Indiana, was engaged in the manufacture of a four-axle mixer in competition with Western and Sims. No other company was manufacturing three-axle mixers at that time. In 1971 Western sold the drawings and specifications belonging to Sims to Rite-Way Inc. Rite-Way then began to manufacture three-axle mixers in competition with Sims. As a direct result of information supplied to Rite-Way by Western, from 1969 to 1971, Rite-Way also acquired a substantial and profitable business in replacement parts for the tree-axle mixers. From 1971 through 1974, according to the testimony of Mr. William F. Bowen, Vice President and General Manager of Indiana Rite-Way Truck Co. and Vice President of American Rite-Way Truck Sales, Inc. from March, 1972 through July, 1974, Rite-Way made a

gross profit of $230,000.00 from its replacement parts business for three-axle mixers.

Testimony on lost profit was also given by Mr. Royal W. Sims. Mr. Sims, a plaintiff in this case, invented his first truck in 1960 and has produced vehicles such as the three-axle mixer since 1964. At the same time he began his replacement parts business. In his testimony Mr. Sims demonstrated his knowledge of the replacement parts business and the wear life of the mixers in operation. The Court found him to be a credible and experienced witness, expert in his field. Using the records of his company Mr. Sims prepared and presented figures which isolated and calculated the loss of gross profit to his company in the replacement parts business for three-axle mixers from 1971 through 1974 to be $283,000.00. He further testified that based upon those records and his opinion the loss of net profit for that same period was $191,426.00. The Court accepts this figure as the loss of net profit for that period on the replacement parts business for three-axle mixers suffered by plaintiffs as the foreseeable, proximate result of defendant's breach of contract. This lost profit is not speculative as in the case of a business to be established in the future. It is also supported by the figures presented by Mr. Bowen in his testimony. The plaintiffs are entitled to an award in that amount.

The testimony presented regarding the loss to the plaintiffs by defendant's conversion of trade secrets was conflicting. The Court, however, is satisfied by a fair preponderance of the evidence that the conversion resulted in a loss to the plaintiffs of at least $150,000.00. This loss was the direct, foreseeable and proximate result of defendant's wrongdoing.

The Court finds no merit to the defendant's suggestions of a bar to recovery in this area due to the release of a joint tort feasor or of defendant's claim that plaintiffs

could have mitigated damages by purchasing a copy of the plans and drawings from Western. By making these documents available to others for a nominal charge Western effectively destroyed much of the value of the plans and drawings to Sims. For Sims to have purchased a copy from Western would have been pointless.

The defendant in this case breached the license agreement not only by refusing to return the plans and drawings to the plaintiffs but also by making these items available to a known competitor of Mr. Sims for a nominal fee. The Court after hearing all the testimony and examining all the evidence can only conclude that the conduct of the defendant was wilful and malicious. Such bad faith conduct rises to a level that requires the Court to take severe action. Such attmpts to destroy the business property of another must be discouraged. Because this Court finds the conduct to have been wilful and malicious and in order to deter such conduct by others the defendants are ordered to pay punitive damages in the amount of $100,000.00.

In summary the plaintiffs are entitled to receive from the defendant compensatory damages of $191,426.00, damages for conversion of trade secrets in the amount of $150,-000.00, punitive damages of $100,000.00, plus costs and reasonable attorney fees.

It is so ordered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ROYAL W. SIMS, Trustee, and R. W. SIMS TRUST
Plaintiffs,

vs.

WESTERN STEEL COMPANY, a corporation of the State of Utah
Defendant

(Filed in United States District Court, District of Utah)
(June 8, 1976)

Civil No. C-74-131

Findings of Fact and Conclusions of Law and Judgment

This Honorable Court, having found for the Plaintiffs on hearing dated April 28, 1976, following final argument by counsel for the above respective parties, fiinds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. The R. W. Sims Trust is a trust organized under the laws of the State of Utah.

2. Royal W. Sims, Trustee, is an individual residing in the State of Utah and is Trustee of the R. W. Sims Trust.

3. Western Steel Company is a corporation organized under the laws of and doing business in the State of Utah.

4. Royal W. Sims and R. W. Sims Trust are the owners by assignment of all rights, title and interest in the United States Patent No. 2,859,949 issued to J. Jack Willard on November 11, 1958 and entitled "Forward Dis-

charging Transit Concrete Mixer" (hereinafter referred to as the Willard Patent).

5. On or about the year 1965, Western Steel Company (hereinafter sometimes referred to as Western) received an exclusive license under the Willard Patent from Plaintiffs for the purpose of manufacturing forward discharging concrete mixers.

6. The granting of the 1965 exclusive license agreement was predicated upon Plaintiff's lack of sufficient capital to finance large scale production of the large and expensive forward discharging concrete mixer machines and upon Plaintiff's agreement to assist Western Steel Company in the development of the product.

7. In 1967, litigation developed between the same parties to present suit and involving the same subject matter, i.e. the Willard Patent. The previous litigation is identified as *R. W. Sims et al* v. *Western Steel Company*, Civil No. 215-67 (D. Utah 1967). Starting with the 1967 litigation and continuing to the present date the court finds a history of litigation which has been, with brief interludes, virtually continuous and has been unnecessarily protracted by the actions of Western Steel Company.

8. On December 16, 1968, the 1967 action was dismissed by this Court, with prejudice, upon stipulation of the parties and motion to this Honorable Court.

9. Defendant Western Steel Company, by the stipulation, dated December 16, 1968, agreed with the order of the Court that the Willard Patent was valid.

10. Pursuant to the stipulation between the parties, this Court entered an order of dismissal with prejudice incorporating the stipulation, such order dated December 16, 1968. The parties to the present and previous suit also concurrently entered into an agreement whereby Western Steel Company was given a nonexclusive nontransferrable

license to exhaust its inventory. Western agreed to terminate its manufacture of forward discharging concrete mixers covered by the Willard Patent upon the completion of 200 trucks which were to be manufactured from Western Steel Company's then existing inventory. In no event was such further manufacture to extend beyond the 12th day of March, 1971. Western Steel further agreed to return all working drawings, designs and such other technical information as it had in its possession relating to the manufacture, use and sale of forward discharging concrete mixers.

11. During the period when Western Steel Company was a licensee of Plaintiffs, the parties agreed to a reasonable royalty of $1,000 per unit for each three-axle forward discharging mixer manufactured and a reasonable royalty of $1,500 for each four-or-more-axle forward discharging mixer manufactured.

12. This royalty was temporarily reduced upon termination of the license agreement between Plaintiffs and Western Steel Compay to prevent financial hardship on Western and to permit them to manufacture a limited number of units from inventory.

13. The drawings, designs and other technical information in the possession of Western Steel Company, as of December 1968, represented the combined knowledge of Plaintiffs and Defendants, developed and accumulated in the course of Western's production of approximately 123 forward discharging concrete mixers.

14. Western failed to return the drawings, designs and technical information as agreed. Instead Western gratuitously offered Rite-Way, Inc. of Indiana, Plaintiffs' competitor, the entire store of knowledge.

15. The Plaintiffs, R. W. Sims et al., brought the present suit against Western Steel Company alleging patent infringement and breach of agreement and seeking, inter

alia, to effect the return of the drawings, designs and technical information. This Court, in the present suit, found that Western Steel Company was in breach of its contractual obligations. Consequently this Court rendered partial summary judgment for the Plaintiffs on December 20, 1974.

16. Rite-Way, Inc. of Indiana (hereintfter referred to as Indiana) is a business organized under the laws of and doing business in the State of Indiana, having a principal place of business at 320 Ernst Court, Fort Wayne, Indiana.

17. Plaintiffs granted a limited license to Indiana to manufacture four-or-more-axle forward discharging transit concrete mixers. This limited license terminated in 1966. Indiana continued, however, to manufacture four-or-more-axle forward discharging transit concrete mixer units on a greatly reduced scale.

18. On or about August of 1969, employees of Indiana (the competitor of Plaintiffs) were invited to the Western Steel Company facility in Salt Lake City to review those facilities and to receive both technical information and customer data.

19. The then purchasing agent of Indiana went to the facilities of Western Steel Company and was given substantial technical information, including customer lists, vendor and source lists, and other information useful in the manufacture, use and sale of a 'three-axle forward discharging transit concrete mixer" as manufactured by Western Steel Company.

20. Western Steel Compnay knw at the time it transferred its technical data, specifications, drawings, customer lists, plans and designs to Indiana that Indiana was actively engaged in the manufacture of transit concrete mixers.

21. Western Steel Company was aware that Indiana was interested in entering the three-axle forward discharging concrete mixer market.

22. Indiana, at the time it acquired the technical data from Western Steel Company, was not licensed by Plaintiffs to manufacture or sell forward discharging transit concrete mixers and was, in and after 1970, operating under the protection of a bankruptcy court.

23. Unlicensed manufacture of three, four and five axle forward discharging transit concrete mixers by Indiana, subsequent to the transfer thereto by Western of the drawings, designs and technical information, was a natural and direct result of the transfer.

24. A "three-axle forward discharging transit concrete mixer" is legally saleable in all of the fifty states of the United States. Whereas, four-or-more-axle forward discharging transit concrete mixers are legally saleable in only eleven or twelve of the fifty states in the United States.

25. Prior to 1971, Indiana had been unsuccssful in entering the three-axle forward discharging concrete mixer business although it had produced two prototypes of such a unit.

26. During 1971, while Indiana was operating under the protection of the bankruptcy court and in response to a request by Indiana to Western for additional drawings, Western offered to sell Indiana, at a nominal price of $109.31, more than 231 of Western's drawings involving such data as critical specifications, the construction of component parts, location of components, arrangement of drive line, wheel and axle holding bases, and the like.

27. The drawings, designs, technical information and the like possessed by Western Steel Company represented an accumulation of the experience and knowledge they had

gained from the construction of 123 trucks, the inspection and use of Plaintiffs' tools, dies, fixtures and facilities and the periodic discussions and consultations which Defendant held with Plaintiffs.

28. Indiana, at the time it acquired the information from Western, lacked the technical knowledge and ability to manufacture and sell successfully the three-axle forward discharging concrete mixer.

29. With the aid of the technical information, drawings and the like provided by Western, Indiana was able not only to successfully and rapidly enter the three-axle forward discharging concrete mixer business, but also to broaden its market for all sizes of trucks.

30. Entry into the three-axle forward discharging concrete mixer business enabled Indiana to construct four- and five-axle forward discharging concrete mixers from a common inventory because many parts for the three, four and five-axle trucks are standardized.

31. As a further consequence of obtaining the designs, drawings, specifications, vendor lists and customer lists from Western, Indiana was able to successfully enter the highly-profitable aftermarket business (replacement parts and service) by selling largely to Western's customers.

32. With the aid and assistance of the drawings, designs, technical information and specifications provided by Western, Indiana moved swiftly from the position of an unprofitable and insolvent business to a steadily improving position of profitability for the period extending from 1970 through 1973, making substantial gains in profitability for each of said years.

33. Plaintiffs were unable to press or collect royalty claims against Indiana by reason of the bankruptcy laws which prevent the enforcement of the patent claims; such claims being "not proven or provable" against a party

operating under the protection of a Chapter XI bankruptcy.

34. Plaintiffs are the owners of Travel Batcher, Inc., a corporation organized under the laws of and doing business in the State of Utah and actively engaged in the business of manufacturing forward discharging transit concrete mixers and Plaintiffs' intended successor to the Western Steel Company manufacturing business under the exclusive license.

35. The primary purpose for requiring the return of all drawings, designs and technical information in the possession of Western Steel Company was to facilitate re-entry of Plaintiffs into the business of manufacturing forward discharging transit concrete mixers, to enter the lucrative aftermarket business, and to prevent these materials from falling into the hands of Plaintiffs' competitors.

36. Plaintiffs began the necessary steps to acquire the stock of Indiana for the following reasons:

a) to prevent further infringement of the Willard Patent.

b) to stop the unlicensed, direct competition by Indiana with Plaintiffs, and

c) to enable Plaintiffs to obtain past royalties and lost profits.

37. Plaintiffs' plan of acquisition was commenced by first acquiring 12½% of the stock of Indiana. Further acquisition was prevented and rendered impractical and impossible by the rapid increase in profitability of Indiana brought about by the intervention of Western. The loss of profit to Plaintiffs was a natural and foreseeable result of the wrongful intervention by Western. The rapid and substantial change of Indiana from an insolvent company to a profitable company was made possible because of Indiana's

successful increased production of forward discharging transit concrete mixers in violation of Plaintiffs' patent rights. The profit generated by Indiana was a direct result of the information and technical knowledge provided to Indiana by Western Steel Company.

38. Indiana subsquently was removed from Chapter XI bankruptcy by a plan of reorganization.

39. Indiana showed on its books at the time of its removal from Chapter XI bankruptcy, as a royalty reserve, a total of $491,000 due and owing Plaintiffs for units manufactured in infringement of the Willard Patent.

40. As part of the reorganization plan for Indiana, Indiana was purchased by Moran Tank Company. Moran Tank Company agreed to pay Indiana's obligations to Plaintiffs in exchange for a release from Plaintiffs.

41. No portion of this $491,000 has been paid to Plaintiffs.

42. In or about February 1974, Plaintiffs released Indiana and Moran Tank Company from infringement claims. However, Plaintiffs never intended that Western, which had provided all of the customer lists, drawings, designs, and technical data to Indiana would benefit from this release. Western was not mentioned or alluded to in the release of Moran Tank Company and Indiana. There was no evidence apparent to Plaintiffs that Western Steel Company had become deeply involved with Indiana. There was no reason to think that Western would breach its agreement with Plaintiffs by giving such aid and assistance to Indiana.

43. The forward discharging transit concrete mixer covered by the Willard Patent is a substantial and pioneer invention that has satisfied a long-felt need in the industry.

44. The forward discharging transit concrete mixer covered by the Willard Patent has been widely copied. The

Willard Patent has been the subject of many license agreements between Plaintiffs and companies such as, but not limited to, C.M.C., Advance Mixer, Inc., Front Discharge Mixer, Inc. and Western Steel Company.

45. The Willard Patent has been the subject of substantial litigation and, in all instances, the litigation has been terminated by agreements between the parties, wherein the validity and infringement of the Willard Patent have been admitted.

46. All of the units manufactured by Indiana subsequent to their obtaining the drawings, designs, and technical information from Western in August, 1969 constitute infringement of the Willard Patent, as each unit incorporates the same patented construction and design. The post 1969 infringement was induced by Western Steel Company.

47. There is a correspondence between each element of Claims 7 through 12 of the Willard Patent and a counterpart element of the accused Indiana construction. The claimed elements of the patent and the corresponding elements of the accused construction function in the same manner, to produce the same result. The accused construction and the patented construction are virtually identical in both functional and structural aspects and therefore one is the infringement of the other.

48. The Court finds that the inducement by Western to infringe Plaintiffs' patent was knowing and willful. The facts support a finding of intentional infringement by revealing a total disregard for the patent and contractual rights of Plaintiffs. Such a finding is further supported by the fact that Western deliberately withheld the drawings, designs, data, customer lists and specifications from Plaintiffs and deliberately gave that same material to Indiana, the competitor of Plaintiffs, for the known and intended

purpose of inducing infringement by Indiana and causing willful harm to Plaintiffs.

49. Indiana's use of the information obtained from Western caused incalculable and devastating harm to Plaintiffs, such as lost profits, lost customers and lost markets.

50. The Court notes the advanced age of the Trustee and founder of Plaintiffs' business for the development and manufacture of forward discharging units. The Trustee is no longer able to continue the business under the protection of a now-expired patent and in the face of the Western-induced competition by Indiana. The Court finds that the Trustee was the party who pioneered the development and construction of this unit and was deprived of both the patent rights and the use of enjoyment of his pioneering efforts by the actions of Western Steel Company.

51. The Court finds Western's conduct unconscionable in that more than half the life of the patent was expended in wasteful, nonproductive disputes. As a result, Plaintiffs have derived no benefits under either the patent or the contract which formed the basis of a dishonored settlement entered into between the parties pursuant to order of this Court.

Conclusions of Law

1. This Court has jurisdiction of the subject matter and parties to this litigation under 28 USC 1338(a), 28 USC 1338(b) and 35 USC 281.

2. The Court finds a history of litigation which has been protracted unnecessarily by the action of Western Steel Company and the deliberate withholding of technical information from Plaintiff, in breach of the agreement to return such information.

3. The transfer of the drawings, designs and technical information to Indiana by Western was done intentionally

and with full knowledge by Western that such information could and would be used to infringe the Willard Patent.

4. The transfer of the drawings, designs and technical information by Western to Indiana was done with full knowledge that Indiana would enter into direct competition with Plaintiffs and was, therefore, an inducement to infringe under 35 USC 271(b).

5. Infringemet of the Willard Patent by Indiana, given the means to do so by Western, was a natural and foreseeable consequence of the transfer of the aforementioned drawings, designs and technical information.

6. Inducement to infringe under 35 USC 271(b) is made by statute a separate and distinct tort from direct infringement arising under 35 USC 271(a).

7. Claims 7 through 12 read in light of the specification of the Willard Patent are literally infringed by each and every one of the units manufactured by Indiana.

8. The unlicensed manufacture, use and sale of three-, four- and five-axle trucks by Indiana constitutes a direct infringement of the Willard Patent under 35 USC 271(a).

9. A defense of non-infringement is inapplicable to claims 7 through 12, where the defense is based on limitations appearing in claims 1 through 6. Claims 7 through 12 do not contain such limitations and are thus clearly and unmistakably infringed by the accused construction.

10. There is a presumption of validity of the Willard Patent, 35 USC 282.

11. It is not the burden of Plaintiffs to show validity of the patent, but rather the burden of the party asserting invalidity to plead such as an affirmative defense and to establish the same. 35 USC 282(a).

12. Where parties have terminated litigation by stipulation, abandoning all claims of invalidity of the patent

and where the stipulation is incorporated into and made a part of an "Order of Dismissal With Prejudice", the Order of Dismissal is on the merits and the issue of validity may not thereafter be relitigated or raised between the same parties under the doctrine of res judicata.

13. "Release" is an affirmative defense which must be pleaded and proved, FRCP 8(c).

14. The affirmative defense of release is governed by federal law when the release pertains to a federal right.

15. The law of the State of Utah on release is inapplicable when the release relates to a federal right.

16. A release is only effective as to those parties of whom the releasor has knowledge and consciously intends to release.

17. A release granted to one party for infringement does not release a separate and distinct party from liability for inducement to such infringement, particularly where inducement to infringe is made, by statute, a separate and distinct tort.

18. Where Defendant fails to plead an affirmative defense based upon release, after having been admonished, more than one year prior to trial, by the Court to so amend its pleading, leave will not be granted on the day of trial to add such a defense.

19. A late request to add an affirmative defense, based upon release, when the party has had knowledge of the affirmative defense two years before the date of trial and before the commencement of the litigation imposes an unreasonable burden upon the Court and the opposing party and refusal to grant leave to so amend the pleadings is within the discretion of the Court.

20. A two year delayed motion to add an affirmative defense based upon release, coupled with a demand for a

jury trial, by a party having knowledge of the defense and having been admonished by the Court more than one year prior to the trial to add the defense, will be denied.

21. The right to a jury trial is waived, FRCP 38(d), by failing to make a demand therefor within ten days following the last responsive pleading, FRCP 38(b). The untimely demand for a jury trial, even if made within ten days of the last relevant pleading does not revive waived rights to a jury trial arising under the original pleadings.

22. A Defendant seeking to amend its pleadings to add an affirmative defense must do so in a timely manner, particularly where such an affirmative defense is coupled with a demand for a jury trial effective for that issue only.

Damages

1. The measure of damages for patent infringement is stated under 35 USC 284 which provides for the award of damages to the claimant adequate to compensate for the infringement, but in no event less than a reasonable royalty.

2. The Court may award damages to the claimant equal to his lost profits, without an accounting, when the last profits are clear from the evidence.

3. The Court may award damages for inducement to infringe equal to the lost profits of the patent owner, when the district infringement is a natural and foreseeable result of the inducement.

4. The damages in this case shall be assessed as the lost profits of the patent owner.

5. The Court finds damages to the Plaintiffs in the amount of $491,000, which represents the aggregate total loss of profit to Plaintiffs by reason of the tortious intervention of Western.

6. The lost profits of Plaintiffs amount to $491,000 which is the total accrued royalties of Rite-Way, Inc. of Indiana to which Plaintiffs were entitled and would have received but for the tortious intervention of Western.

7. The Court may increase damages up to three times the amount found and assessed:

a) when the inducement to infringement is done knowingly, intentionally and in complete disregard of the rights of the patent owner;

b) where the validity of the patent is decided by res judicata arising from prior litigation; and

c) where the scope of the patent is known between the parties from extensive prior investigation and protracted litigation.

8. The Court may assess attorney fees under 35 USC 285 in exceptional cases such as, where the litigation has been unnecessarily protracted and lengthened by the non-prevailing party and has necessitated long and involved proceedings concerning a matter which is essentially uncomplicated, said litigation extending through multiple suits over a nine year period.

9. The Court may treble damages on a finding of bad faith in the conduct of one of the parties. The facts clearly show that Defendants conduct constituted an inducement to infringe a patent in direct breach of an agreement stipulated to by the parties. Such conduct strongly evidences the willful disregard for the adjudicated rights of the Plaintiffs to full enjoyment of their patent and contract rights.

10. The Court may further grant costs of litigation to the prevailing party under 35 USC 285, such assessment being within the discretion of the Court when it finds that the infringement has been committed knowingly, intentionally and where there is no reasonable doubt as to the validity of the patent.

JUDGMENT

Judgment is rendered for the Plaintiffs. Damages are assessed at $491,000, which damages are trebled. The Court assesses against Defendant costs and the Defendant shall pay to Plaintiffs reasonable attorney fees, which amount shall be established and proved by submission of supporting data satisfactory to this Court.

So entered this 8 day of May, 1976.

/s/ Willis W. Ritter
Willis W. Ritter, Chief Judge
United States District Court

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-1046

ROYAL W. SIMS AND R. W. SIMS TRUST, *Petitioners,*

v.

WESTERN STEEL COMPANY

Order Extending Time To File Petition For Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 21, 1977.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 11th day of June, 1977.

APPENDIX D

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. ——

ROYAL W. SIMS AND THE R. W. SIMS TRUST, *Petitioners*

v.

WESTERN STEEL COMPANY, *Respondent*

Affidavit

I, Willis W. Ritter, residing at Salt Lake City, Utah, am the Chief Judge of the United States District Court for the District of Utah, and on my oath, I declare the following to be true to the best of my information and belief:

The citizens of Utah and of the United States have a legitimate interest in preserving the integrity of the federal judicial system in our State. I believe that system is eroding badly in Utah.

An unfortunate situation prevails in the Tenth Circuit wit' n which the District Court over which I preside is located. It is essential to call this matter to the attention of the Supreme Court of the United States, so that, in its capacity as supervisor of the federal judicial system, it may attempt corrective steps. The judicial process now followed seriously threatens the ability of parties who have tried cases in my court to receive fair and impartial justice on appeal.

At the outset, I would like to make it clear that I am not interested in any way in the outcome of the case in connection with which this affidavit is submitted. But since I am constitutionally permitted to speak in my judicial capacity only in cases and controversies, I have agreed to provide the petitioner for certiorari in this case this affidavit to bring my views to the attention of the Supreme Court. I

have no connection, financial or personal, with any party or attorney in this case. I do have the conviction that a proper judgment rendered by my Court has been wantonly reversed on the basis of extra-judicial considerations.

I have served on the federal bench for 27 years. Parties who come before me have the right to a fair trial and, I believe, they get it. No less, if an appeal is taken, they have a right to an even-handed, unbiased hearing on appeal. The right to receive such a hearing on appeal from my court has been frustrated by the personal hostility directed against me by the Chief Judge of the United States Court of Appeals for the Tenth Circuit, Judge David T. Lewis, and by several of the other judges who sit on that Circuit Court. If the differences between me and Judge Lewis and his colleagues were confined to mere differences of opinion on judicial policy or judicial administration, I would not bring the matter to the attention of the Supreme Court. However, rancor has so permeated the Tenth Circuit's relationship to me and, as a result, to the judgments from and the proceedings in, my court, that the rights of litigants to due process have been compromised. I, thus, feel compelled to speak out.

(I have also prepared and am filing with the Judicial Conference for the Tenth Circuit a statement describing what I believe to be the underlying basis for the controversy between my court and the Tenth Circuit Court of Appeals, but that is beyond the scope of this Affidavit.)

That litigants before my court are denied a fair hearing on appeal is evident from a comparison of the rate at which judgments of my court are reversed by the Tenth Circuit, when compared to the rate at which my decisions were reversed by the Ninth Circuit while I served by designation as a District Judge of the United States District Court for the Northern District of California. Chief Judge Lewis F. Goodman of the Northern District of California (now deceased), requested me to sit, and I did so sit, as a United

States District Judge in his District for a period of six years from 1954 to 1960, for intervals of two to four months per year. This is an arrangement which was continued with great satisfaction to all throughout the six years. My decisions were subject to appellate review by the Ninth Circuit Court of Appeals. Although the figures are not readily available, I know that of the [nearly 100] decisions rendered on the merits, the rate of reversal was no greater than the average 15% to 20% rate of reversal all appeals take in the federal courts. In contrast, it was reported last year in connection with S. 1130, A Bill Relating to Chief Judge—Grandfather Clause, that over the period of 1949-1975, of the reported civil decisions alone, 58% of my decisions have been reversed, while a 20%-21% reversal rate applies to the two judges who concurrently sat in the District of Utah. *Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee on S. 1130,* 94th Cong., 2d Sess., 17 (1976). In criminal and habeas corpus matters, the reversal rate was even more disproportional. This reversal rate should also be analyzed from the standpoint of the Supreme Court's review of the decisions of the Tenth Circuit. Six of the Circuit Court's reversals of my decisions have been subsequently reviewed by the U.S. Supreme Court. This court has sustained the Tenth Circuit only once, and one case was remanded to my court.

As a further basis of comparison, in the fiscal year ending June 30, 1976, 17.9% of all cases disposed of by all of the United States Circuit Courts of Appeals, after hearing or submission, were reversed. This compares very closely with the 17.6% reversal rate of all cases disposed of by the Tenth Circuit Court of Appeals after hearing or submission. Annual Report of the Director of the Administrative Office of the United States Courts for 1976, at 277. According to the Report, there were a total of *67* reversals by the Tenth Circuit Court of Appeals, of which 17 were in civil

matters. Ten of these civil cases arose in my court. In that period, the deplorable fact is that every reported civil appeal from my court resulted in reversal in whole or in part by the Tenth Circuit Court of Appeals.

I attribute this extraordinary reversal record of cases from my court to the personal rancor towards me on the part of Judges David T. Lewis, Robert H. McWilliams and Jean S. Breitenstein. The handling of this appeal, decided by a panel including Judge McWilliams, illustrates the lengths to which the Tenth Circuit will go to embarrass me at the expense of litigants. In this case, the parties were before my court over a ten-year period. I rendered three separate opinions relating to the patent, contract, and unfair competition issues, and thereafter, damage issues. The trial, including the hearing for damages, consumed over two weeks, and was reflected by over 560 pages of transcript reporting the testimony of twelve witnesses. After considering 70 Plaintiff Exhibits (one of which alone consisted of 230 drawings), 13 Defendant Exhibits, and after hearing the testimony of these twelve witnesses, two of whom were experts in a technical field, I made 83 findings of fact and conclusions of law which were detailed and supported in each instance by the Record developed before me at trial.

Despite the fact that Rule 52 of the Federal Rules of Civil Procedure requires the Court of Appeals to accept the findings of fact of a District court unless they are clearly erroneous, I believe that some of the judges of the Tenth Circuit presume error in my findings and look for a reason to reverse. In this case, the Tenth Circuit overruled my findings based upon "evidence" principally in the form of a release document, which I had excluded from consideration upon timely objection, on the ground that the party seeking to introduce the "evidence" failed to plead the release as required by Rule 8(c), Fed. R. Civ. P. Nevertheless, the Court of Appeals, as it has many times, but most egregiously here, simply ignored the evidence that was admitted and based its reversal upon evidence which had been properly excluded and was not even a part of the record on appeal. At no point did the Court refer to the *record*, the *exhibits*, or the *witnesses* to support its version of the facts, to hold my findings "clearly erroneous" within the meaning of Rule 52. Here, as in many cases, the appellate court became a trial court de novo and simply denied the appellee the benefits of the judgment it had properly been awarded.

This well-known spectacle has made the federal court system in Utah the object of public scorn and contempt. More than 40 writs of recusal and mandamus have been filed in my court within the last year and caused me to devote an inordinate amount of judicial resources to consider these generally baseless pleadings. This is the outgrowth of tacit encouragement of this type of harrassment by the Tenth Circuit. To illustrate the demeaning manner in which the Circuit Court treats my work, I can cite the very recent example of *State of Utah* v. *Gilmore*. In that case, I ordered a stay of execution the day before Gary Gilmore was scheduled to be executed. I believed then, as I do now, that before Gilmore was executed, a judicial determination was needed of whether the Utah Statute, under which Gilmore was sentenced, is constitutionally valid. There should have been, but never was, any appellate review of the record of the trial and sentencing. The unjudicial technique by which my decision was reviewed is described in the attached affidavit (Exhibit 1) of one of the attorneys of the American Civil Liberties Union who represented Gilmore.

My further concern is for the citizens of Utah and the accessibility of the federal court system to their needs. Litigants in Utah are reluctant to enter the federal courts because trial decisions in my court are so likely to be overturned on appeal. As there are but two judges in Utah, one half of all incoming litigants are assigned to my court. The method of judge assignment is entirely on a random basis.

The system works by lot, and chance is the only factor in the determination of assignment of judge. In every case before my court, the litigant and his attorney must consider whether their cause is best served by trying their case on the merits or against the judge. If the litigant wins at trial before me, he can literally expect the burden of having to prove his case anew on appeal, but suffering the presumption that the trial court was in error. This is a situation no litigant in the federal courts should face.

The judicial process in Utah has been further hampered by the routine, unwarranted interference of the Circuit Court in the day-to-day operations of the District Court. Chief Judge Lewis, who sits in Salt Lake City, has established a novel procedure for reviewing proceedings in my court. Thus, during the recent hearings in *U.S.* v. *Countryside Farms, Inc.*, Crim #75-76, Chief Judge Lewis arranged for continuous surveillance of the proceedings, even before the case was before him in an official capacity, as is evidenced by the enclosed transcript of proceedings in that case (Exhibit 2). He permitted attorneys for the Government to consult with him frequently as the hearings progressed. This procedure not only interfered with my ability to maintain order in my court, but also served to encourage the attorneys to disregard my rulings and otherwise conduct themselves in a way that showed their lack of respect for the court. The independent authority of the District Court was compromised in the process.

Both the possibility that appellees from my court are being denied their right to an impartial hearing on appeal and the breakdown of the federal judicial system in Utah are serious concerns. I respectfully urge the Court to take judicial notice of these problems in order to restore an orderly system of legal process to the State of Utah.

STATE OF UTAH
COUNTY OF SALT LAKE

Willis W. Ritter, having been first duly sworn, deposes and says: (i) that he is the person who executed the foregoing instrument; (ii) that he has read the same and knows the contents thereof; and (iii) that the matters therein are true to his knowledge, except such matters as are stated to be upon information and belief and as to those matters, he believes them to be true.

Witness my hand this 16th day of July, 1977.

/s/
WILLIS W. RITTER, Chief Judge
U.S. District Court, District of Utah

Subscribed and sworn to before me this 16th day of July, 1977.

/s/ SANDRA HOWARD
Sandra Howard
Notary Public
[SEAL]
My commission expires: 4/4/78

Exhibit 1

Affidavit

Judith Romney Wolbach, upon her oath deposes as follows:

1. I am an attorney at law in good standing, admitted to practice in all of the courts of the State of Utah, the United States District Court of the State of Utah, Central Division, and the United States Court of Appeals for the Tenth Circuit.

2. On January 16, 1977, I appeared with Virginius Dabney, cooperating attorney for the Utah Affiliate of the American Civil Liberties Union, before Judge Willis W. Ritter, Chief Judge of the United States District Court of the State of Utah, as counsel for the plaintiffs in *Renie Cohen, et al. vs. Scott Matheson, et al.*

3. In this action, the plaintiffs, on behalf of themselves and all taxpayers of the State of Utah, claimed, *inter alia*, that the wrongful acts of the defendants had caused and would continue to cause public funds to be unlawfully expended for the execution of Gary Mark Gilmore pursuant to an unconstitutional statute, causing them and the class they represented irreparable harm.

4. Accordingly, all other attempts to prevent the execution having proved to be futile, the plaintiffs sought injunctive relief, and after full hearing with the arguments of counsel for the plaintiffs had the arguments of counsel for the defendants, were granted a Temporary Restraining Order and Order on Hearing for Preliminary Injunction and Writ of Mandamus. Judge Ritter signed this order, after approximately one hour of deliberation in chambers, at 1:05 a.m. on January 17, 1977.

5. Shortly thereafter, Robert B. Hansen, Attorney General for the State of Utah, requested the Clerk of the Tenth Circuit Court of Appeals to convene a three-judge panel for hearing on his Motion for Stay of Judge Ritter's Order.

6. At approximately 2:30 a.m. on January 17, 1977, Mr. Hansen informed Mr. Dabney and me that the panel would be convened and that he, his deputies, and Chief Judge David T. Lewis of the Tenth Circuit Court of Appeals were flying to Denver, Colorado in a state owned and operated airplane for a hearing scheduled for approximately 6:00 a.m. that same day.

7. I agreed to appear before the Tenth Circuit Court of Appeals and to fly to Denver with Mr. Hansen, his deputies, and Judge Lewis, for the reason that no other transportation, commercial or private, was available to me at that time.

8. I arrived at the courthouse in Denver at approximately 6:20 a.m. where I was met by ACLU cooperating attorneys William F. Reynard and Rollie Rogers and ACLU regional counsel Michael Livingston and Stephen Pevar. We were able to confer only briefly and were informed by the Clerk of the Court, at approximately 6:50 a.m., that the Court had already convened.

9. When we arrived in the courtroom Chief Judge Lewis, Judge Breitenstein, and Judge McWilliams were presiding at the bench and one of the members of the Utah Attorney General's office was addressing the Court.

10. After brief statements by the movants, Stephen Pevar rose to argue that the scope of the Court's review and mandamus power was severely limited in this instance, and that it would be a patent abuse of judicial discretion for the Court to grant the mandamus request. Mr. Pevar also very ably pointed out that the determinative question was whether or not there had been gross abuse of discretion below and that it was incumbent upon the Court to give Judge Ritter a hearing to defend his Order.

11. However, Judge Breitenstein curtly, and in my opinion discourteously, interrupted Mr. Pevar's arguments,

cutting him off repeatedly and stating "As far as I'm concerned, you're wasting your time." The Court demanded that Mr. Pevar address the merits of the case, without specifying what they viewed as merits. Since Mr. Pevar, being unfamiliar with the pleadings in the case below, was unable to respond, Rollie Rogers rose and requested that I be permitted to address the Court on the merits.

12. It thereupon became necessary for me to present the taxpayers' action, in abbreviated form, as it had been argued before Judge Ritter earlier that morning. At the conclusion of my remarks, Rollie Rogers moved the Court for a stay until further review, then pending, by the United States Supreme Court.

13. This motion was denied and Judge Lewis, observing the time for the scheduled execution of Gilmore was near at hand, recessed the Court at approximately 7:30 a.m.

14. Only five minutes later, without even affording Judge Ritter the right to answer and to be heard as one of the respondents, the Tenth Circuit Court of Appeals issued its Order staying Judge Ritter's Temporary Restraining Order, and further, completely extraneous to mandamus, ordered him "to take no further action in any manner, nor of any kind involving Gary Gilmore, unless such matter is presented by a duly accredited attorney for Gilmore or by Gilmore himself."

15. Thereafter, the Clerk of the Court refused our request to use a conveniently located telephone to call Al Bronstein who was awaiting our call in the Clerk's Office at the United States Supreme Court.

DATED this 14th day of July, 1977.

/s/ JUDITH ROMNEY WOLBACH
Judith Romney Wolbach
Attorney at Law

State of Utah)
: ss
County of Salt Lake)

On 14th day of July, 1977, personally appeared before me Judith Romney Wolbach, who acknowledged to me that she signed the foregoing on the date above subscribed.

/s/ DAVID ROBINSON
NOTARY PUBLIC
Residing in Salt Lake County, Utah

My commission expires: 10/29/79

JULY TERM—AUGUST 10, 1976

Before Honorable Robert H. McWilliams, Circuit Judge, Honorable Jean S. Breitenstein, Senior Judge, and Honorable William E. Doyle, Circuit Judge.

No. 76-1331

UNITED STATES OF AMERICA, *Petitioner*,

v.

HONORABLE WILLIS W. RITTER, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, *Respondent*.

The United States, Petitioner, has filed its supplemental petition for writ of mandamus against the Honorable Willis W. Ritter. Upon consideration thereof, it is ORDERED that on or before one o'clock p.m., Monday, August 16, 1976, the Respondent, Willis W. Ritter, shall show cause why an order should not be entered by this Court directing him:

1. To admit to practice before the United States District Court for the District of Utah, Special Attorney William C. Hendricks, who has been appointed by the Attorney General of the United States to conduct proceedings before the Grand Jury now impaneled and sitting in the District of Utah;

2. To vacate his verbal order designated as Rule No. 4 and providing:

> "No Assistant United States Attorney will be permitted to present any matter to the Grand Jury unless previously so authorized by the United States Attorney in writing. And no attorney will be permitted to practice before or present any matter to this Grand Jury unless he has previously been admitted to practice before this Court in charge of the Grand Jury for the purpose of the case in question."

3. And to allow the Grand Jury to proceed forthwith in hearing such cases as United States Attorney for the District of Utah or Special Attorney William C. Hendricks may desire to present to it.

Done at Denver, Colorado this 10th day of August, 1976.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

Exhibit 2

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

CR-75-76

Reporter's Transcript of Hearing of Motion

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

COUNTRYSIDE FARMS, INC.; EGG PRODUCERS, CO.; OLSON FARMS, INC.; SNOW WHITE EGG CO.; R. KENT CHRISTOFFERSON; GILBERT T. COCHRAN, *Defendants*.

Salt Lake City, Utah, January 30, 1976.

BEFORE: The Honorable WILLIS W. RITTER, Chief Judge

Transcript of Proceedings

APPEARANCES:

For the United States: GARY R. SPRATLING, C. ROBERT DASHAROON

For Defendant Countryside Farms, Inc., & R. Kent Christofferson: RICARDO FERRARI

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respect to Section 144 at this time because the affidavit meets the requirements of the statute. Then disqualification is mandatory, and we need not even proceed to Section 455-A where the case law is not so clear about whether or not a hearing may be had.

THE COURT: Well, the Court rules against you on 144.

MR. SPRATLING: In that case, Your Honor, at this time we move for a stay of all proceedings in this case to allow us sufficient time to go to the Court of Appeals for the

Tenth Circuit for a writ of mandamus directing Your Honor to remove himself from this case.

THE COURT: Well, I will take that under advisement until I hear further about this matter.

MR. SPRATLING: I would like to add, Your Honor, that we have been advised by the Clerk of the Court approximately 35 minutes ago that it would like to be advised of the fact of our ruling on the disqualification motion as soon as it happens.

THE COURT: I will reserve a ruling on the disqualification until I hear from the other side.

Mr. CHRISTENSEN: Thank you, Your Honor.

Mr. SPRATLING: I would like to make clear to the Court I have only addressed myself to 144.

THE COURT: I understand.

MR. SPRATLIN: I have not proceeded to 455 yet.

The COURT: I understand.

MR. CHRISTENSEN: Thank you, Your Honor. I should like to point out to the government that we are not seeking a factual hearing as to the truth or the falsity of the statements set forth in the affidavit. We are seeking an opportunity to investigate the sufficiency of the affidavit and it has always been the law——

THE COURT: Now just a minute, I'll have no such thing going on now, Mr. Spratling, you carrying on a conference while counsel is talking to the Court.

Mr. SPRATLING: I did not say a word, Your Honor.

THE COURT: Well, somebody came up from the audience and started to talk to you.

Mr. CHRISTENSEN: We wish the opportunity to test the sufficiency of the affidavit and that was the purpose of re-

questing that we have the opportunity of cross examining the affiant. It is my understanding it's always been the law that when an affidavit is filed in a case that the person making the affidavit can be interrogated to determine whether or not he has actual knowledge of what the basis for the so-called allegations of fact are in the affidavit and I respectfully request the opportunity to cross

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[p. 74]
egg case or anything remotely connected with it.

MR. SPRATLING: We have not alleged that, Your Honor.

THE COURT: And to impugn the honor, the integrity, the decency of one of the finest members of the Federal Bar here, Mr. Harold G. Christensen, is a dastardly piece of work.

Mr. SPRATLING: That was not our purpose, Your Honor.

THE COURT: Well, whether it was your purpose or not——

Mr. SPRATLING: May I say something in response?

THE COURT: I am not going to rule on this thing until I have the cases. Now there are several lines of cases on this. I have referred to some and Mr. Christensen examined the witnesses on some that I hadn't referred to. Now having reference to this affidavit and the affidavit you filed over there in the Circuit, you know how to make things confidential if you want to. There is a part of that affidavit over there in the Circuit—who is that girl that is running in and out of here. Is she your messenger girl, the one that tried to talk to you?

MR. SPRATLING: She is on the staff of the case. I don't know who just left.

THE COURT: Well, the girl in the shirtwaist, the tall one.

Mr. SPRATLING: Miss Holmes.

THE COURT: I don't know what her name is. She came over here and started to talk to you. If she keeps running in and out over there—is she carrying messages somewhere for you as to what is going on?

Mr. SPRATLING: She is attempting to contact the Circuit, Your Honor.

THE COURT: Well, you haven't got anything to contact the Circuit about yet and you are not about to get it until I see those cases. Now I want to be right about this and you have done a very poor job of giving me the cases. You haven't addressed yourself at all to that line of cases which say if all the judge has done is to make rulings in the case and that's all I had done before in the matter before the Grand Jury I discharged that you referred to and I am not going to say any more about it because I think the Grand Jury has been breached—the confidentiality of the Grand Jury has been breached through the activities of the United States Attorney's Office and your office.

Mr. SPRATLING: I disagree with that, Your Honor.

THE COURT: Certainly by the Grand Jury . . .

APPENDIX E

[Separately Attached]

APPENDIX F

REVERSAL RATES: 1966-1976
For All Circuit Courts Of Appeal And For 10th Circuit

Fiscal Year 1976

Circuit and Nature of Proceeding	Total*	Affirmed or Granted	Dismissed	Reversed or Denied	Other	Percent Reversed or Denied
All Circuits	9,351	6,995	406	1,680	270	17.9
Criminal	3,114	2,689	51	334	40	10.7
U.S. Civil	1,474	1,028	65	330	51	22.4
Private Civil	3,746	2,621	215	813	97	21.7
Bankruptcy	135	80	14	33	8	24.4
Administrative Appeals	874	573	60	167	74	19.1
Original Proceedings	8	4	1	3	—	—
Tenth Circuit	382	279	23	67	13	17.6
Criminal	137	120	3	13	1	9.5
U.S. Civil	59	38	2	17	2	28.8
Private Civil	149	95	13	32	9	21.5
Bankruptcy	13	7	3	3	—	—
Administrative Appeals	23	19	1	2	1	—
Original Proceedings	1	—	1	—	—	—

Fiscal Year 1975

All Circuits	9,077	6,763	418	1,632	264	17.8
Criminal	2,938	2,450	69	318	71	11.8
U.S. Civil	1,639	1,144	74	366	55	22.3
Private Civil	3,609	2,567	218	718	106	19.9
Bankruptcy	176	118	14	35	9	19.9
Administrative Appeals	679	474	37	146	22	21.5
D.C. Court of Appeals	—	—	—	—	—	—
Original Proceedings	36	10	6	19	1	—
Tenth Circuit	406	292	24	82	8	19.5
Criminal	112	102	2	6	2	5.4
U.S. Civil	76	51	1	24	—	31.6
Private Civil	163	107	10	41	5	25.2
Bankruptcy	15	9	3	2	1	—
Administrative Appeals	33	22	6	5	—	15.2
Original Proceedings	7	1	2	4	—	—

* Cases disposed of after hearing or submissions.

REVERSAL RATES: 1966-1976
For All Circuit Courts Of Appeal And For 10th Circuit

Fiscal Year 1974

Circuit and Nature of Proceeding	Total*	Affirmed or Granted	Dismissed	Reversed or Denied	Other	Percent Reversed or Denied
All Circuits	8,451	6,429	263	1,579	180	18.6
Criminal	2,911	2,463	33	385	30	13.2
U.S. Civil	1,420	1,025	51	288	56	20.3
Private Civil	3,266	2,330	140	724	72	22.2
Bankruptcy	181	138	8	31	4	17.1
Administrative Appeals	645	466	27	136	16	21.1
D.C. Court of Appeals	—	—	—	—	—	—
Original Proceedings	28	7	4	15	2	—
Tenth Circuit	438	324	13	91	10	19.9
Criminal	141	115	3	21	2	14.0
U.S. Civil	72	56	2	12	2	16.7
Private Civil	169	115	3	46	5	27.2
Bankruptcy	20	13	2	4	1	—
Administrative Appeals	31	25	3	3	—	6.7
Original Proceedings	5	—	—	5	—	—

Fiscal Year 1973

All Circuits	9,618	7,163	540	1,693	222	17.5
Criminal	2,995	2,483	86	374	52	12.5
U.S. Civil	1,699	1,190	110	362	37	21.3
Private Civil	3,987	2,820	284	782	101	19.6
Bankruptcy	188	120	14	47	7	25.0
Administrative Appeals	725	546	39	115	25	15.9
D.C. Court of Appeals	1	—	—	1	—	—
Original Proceedings	23	4	7	12	—	—
Tenth Circuit	736	555	64	107	10	14.6
Criminal	166	133	13	17	3	10.2
U.S. Civil	175	135	8	31	1	17.7
Private Civil	333	250	27	50	6	15.0
Bankruptcy	19	13	4	2	—	—
Administrative Appeals	41	24	10	7	—	17.1
Original Proceedings	2	—	2	—	—	—

* Cases disposed of after hearing or submissions.

REVERSAL RATES: 1966-1976
For All Circuit Courts Of Appeal And For 10th Circuit

Fiscal Year 1972

Circuit and Nature of Proceeding	Total*	Affirmed or Granted	Dismissed	Reversed or Denied	Other	Percent Reversed or Denied
All Circuits	8,537	6,207	549	1,664	117	19.4
Criminal	2,664	2,209	70	356	29	13.4
U.S. Civil	1,526	1,071	104	333	18	21.8
Private Civil	3,422	2,285	297	799	41	23.3
Bankruptcy	188	122	15	47	4	25.0
Administrative Appeals	701	507	56	113	25	16.1
D.C. Court of Appeals	15	8	—	7	—	—
Original Proceedings	21	5	7	9	—	—
Tenth Circuit	657	504	58	91	4	13.8
Criminal	180	142	13	23	2	12.8
U.S. Civil	177	147	13	16	1	9.0
Private Civil	253	188	21	43	1	17.0
Bankruptcy	11	4	5	2	—	—
Administrative Appeals	31	23	2	6	—	19.4
Original Proceedings	5	—	4	1	—	—

Fiscal Year 1971

All Circuits	7,606	5,765	375	1,377	89	18.1
Criminal	2,200	1,853	51	277	19	12.6
U.S. Civil	1,416	1,015	86	302	13	21.3
Private Civil	3,137	2,266	180	650	41	20.7
Bankruptcy	100	78	6	15	1	15.0
Administrative Appeals	708	528	43	123	14	17.4
D.C. Court of Appeals	11	5	2	4	—	—
Original Proceedings	34	20	7	6	1	—
Tenth Circuit	559	464	32	58	5	10.5
Criminal	115	102	3	10	—	8.7
U.S. Civil	151	126	8	15	2	9.9
Private Civil	252	204	17	29	2	11.5
Bankruptcy	6	4	2	—	—	—
Administrative Appeals	29	25	—	4	—	13.8
Original Proceedings	6	3	2	—	1	—

* Cases disposed of after hearing or submissions.

REVERSAL RATES: 1966-1976
For All Circuit Courts Of Appeal And For 10th Circuit

Fiscal Year 1970

Circuit and Nature of Proceeding	Total*	Affirmed or Granted	Dismissed	Reversed or Denied	Other	Percent Reversed or Denied
All Circuits	6,139	4,626	120	1,280	113	20.9
Criminal	1,776	1,441	11	295	29	16.6
U.S. Civil	1,037	750	26	239	22	23.0
Private Civil	2,502	1,793	60	606	43	24.2
Bankruptcy	116	86	5	25	—	21.6
Administrative Appeals	664	527	16	103	18	15.5
D.C. Court of Appeals	7	—	—	6	1	—
Original Proceedings	37	29	2	6	—	—
Tenth Circuit	444	360	6	71	7	16.0
Criminal	81	57	1	21	2	25.9
U.S. Civil	128	117	—	10	1	7.8
Private Civil	209	163	5	37	4	17.7
Bankruptcy	5	4	—	1	—	—
Administrative Appeals	19	18	—	1	—	—
Original Proceedings	2	1	—	1	—	—

Fiscal Year 1969

All Circuits	5,121	3,838	118	1,072	93	20.9
Criminal	1,375	1,155	13	188	19	13.7
U.S. Civil	895	638	26	211	20	23.6
Private Civil	2,076	1,473	64	489	40	24.0
Bankruptcy	118	82	2	33	1	28.0
Administrative Appeals	619	466	10	130	13	21.0
D.C. Court of Appeals	8	3	1	4	—	—
Original Proceedings	30	21	2	7	—	23.3
Tenth Circuit	395	317	8	62	8	15.7
Criminal	90	81	—	9	—	10.0
U.S. Civil	104	84	2	17	1	16.3
Private Civil	164	127	6	25	6	15.2
Bankruptcy	6	5	—	1	—	—
Administrative Appeals	30	19	—	10	1	33.3
Original Proceedings	1	1	—	—	—	—

* Cases disposed of after hearing or submissions.

REVERSAL RATES: 1966-1976
For All Circuit Courts Of Appeal And For 10th Circuit

Fiscal Year 1968

Circuit and Nature of Proceeding	Total*	Affirmed or Granted	Dismissed	Reversed or Denied	Other	Percent Reversed or Denied
All Circuits	4,668	3,499	107	1,009	53	21.6
Criminal	1,150	944	6	184	16	16.0
U.S. Civil	771	547	25	102	7	24.9
Private Civil	2,023	1,475	44	486	18	24.0
Bankruptcy	121	81	4	36	—	29.8
Administrative Appeals	557	424	24	99	10	17.8
D.C. Court of Appeals	14	5	1	6	2	—
Original Proceedings	32	23	3	6	—	—
Tenth Circuit	470	389	11	68	2	14.5
Criminal	83	71	—	12	—	14.5
U.S. Civil	95	73	5	17	—	17.9
Private Civil	269	224	6	37	2	13.8
Bankruptcy	5	4	—	1	—	—
Administrative Appeals	17	17	—	—	—	—
Original Proceedings	1	—	—	1	—	—

Fiscal Year 1967

All Circuits	4,468	3,340	114	954	60	21.5
Criminal	984	838	6	133	7	13.5
U.S. Civil	822	580	25	203	14	24.7
Private Civil	1,927	1,376	57	472	22	24.5
Bankruptcy	137	100	7	29	1	21.2
Administrative Appeals	523	386	16	107	14	20.5
D.C. Court of Appeals	8	3	—	3	2	—
Original Proceedings	67	57	3	7	—	—
Tenth Circuit	393	303	17	55	18	14.0
Criminal	70	59	—	10	1	14.3
U.S. Civil	98	74	6	16	2	16.3
Private Civil	183	443	9	22	9	12.0
Bankruptcy	5	3	—	2	—	—
Administrative Appeals	33	21	2	4	6	12.1
Original Proceedings	4	3	—	1	—	—

* Cases disposed of after hearing or submissions.

REVERSAL RATES: 1966-1976
For All Circuit Courts Of Appeal And For 10th Circuit

Fiscal Year 1966

Circuit and Nature of Proceeding	Total*	Affirmed or Granted	Dismissed	Reversed or Denied	Other	Percent Reversed or Denied
All Circuits	4,087	3,026	128	866	67	21.7
Criminal	801	649	20	115	17	14.4
U.S. Civil	784	572	24	175	13	22.3
Private Civil	1,690	1,193	57	418	22	24.7
Bankruptcy	116	85	7	23	1	19.8
Administrative Appeals	563	414	13	125	11	22.2
D.C. Court of Appeals	10	2	1	4	3	—
Original Proceedings	123	111	6	6	—	—
Tenth Circuit	359	267	8	77	7	20.9
Criminal	44	33	—	11	—	25.0
U.S. Civil	84	69	3	9	3	10.7
Private Civil	208	154	1	49	4	23.6
Bankruptcy	—	—	—	—	—	—
Administrative Appeals	18	9	4	5	—	—
Original Proceedings	5	2	—	3	—	—

* Cases disposed of after hearing or submissions.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-122

ROYAL W. SIMS AND THE R. W. SIMS TRUST,
Petitioners,

v.

WESTERN STEEL COMPANY,
Respondent.

APPENDIX E

Attachment to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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APPENDIX E

CHIEF JUDGE—GRANDFATHER CLAUSE

HEARING

BEFORE THE

SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

S. 1130

A BILL RELATING TO CHIEF JUDGE—GRANDFATHER CLAUSE

MAY 18, 1976

Printed for the use of the Committee on the Judiciary

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WILLIAM P. WESTPHAL, *Chief Counsel*

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S. 1130

A BILL RELATING TO SERVICE AS CHIEF JUDGE OF A U.S. DISTRICT COURT

TUESDAY, MAY 18, 1976

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 6202, Dirksen Office Building, Hon. Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senator Burdick (presiding).

Also present: William P. Westphal, chief counsel; Kathryn M. Coulter, chief clerk; and Harry Dixon, staff of Senator Hruska.

Senator BURDICK. Today the subcommittee has scheduled a hearing on S. 1130, a bill to repeal the so-called grandfather clause which exempted the existing chief judges of two-judge districts from the statute which prohibits service as chief judge beyond 70 years of age. When this age limitation was enacted on August 6, 1958, there were 32 chief judges affected by the grandfather clause.

It is my understanding that today only one of the 32 chief judges still is serving as a chief judge. He is Willis W. Ritter, the chief judge of the District of Utah. Judge Ritter was appointed to the bench on October 21, 1949.

The subcommittee has received a number of letters on this bill, both pro and con. These letters evidence a great interest in this legislation; but because they present essentially hearsay or personal opinions, I, as one member of the committee, will give them less weight than the sworn testimony we will receive here today.

One of the letters which has been written by one Utah lawyer to every member of the Judiciary Committee, reads as follows: "In all fairness without regard to the judicial temperament or capacity or integrity of Judge Willis W. Ritter, is there really legitimate reason for having the only chief judge in the judiciary system over the age of 70 saddled on the lawyers and people of Utah?"

In answer to that question, a "legitimate reason" is that in 1958 a Federal statute provided that this judge, and 31 others, were exempt from the age 70 requirement. But this letter illustrates the reason why I believe that before we receive the testimony of witnesses, it would be helpful if we can identify the specific issue raised by S. 1130.

S. 1130 does not raise the issue of whether the judge should be removed from judicial office, because under present law that issue can

only be decided after impeachment by the House of Representatives. Nor does S. 1130 raise any issue concerning possible disability of the judge, because section 372 of title 28 U.S. Code covers such a situation.

The issue, as I perceive it to be, is whether the judge in question, who continues to serve as chief judge of the District of Utah by virtue of the exception made by the Congress in 1958, is for some reason unable to perform the duties of a chief judge in an effective and expeditious manner.

If it can be demonstrated that he is unable to so perform, then the subcommittee will have to make the further decision of whether repeal of the grandfather clause is appropriate legislative action under all of the circumstances. And, it seems to me, that one of those circumstances involves the separation of powers principle from which has grown the phrase "independence" of members of the Federal judiciary.

While this analysis is not intended as any ruling by the Chair on these or other issues, it has been put forth in an effort to clarify the matter before the subcommittee this morning.

A copy of S. 1130 will be included in the hearing record at this time without objection.

[The above referred to bill follows:]

[S. 1130, 94th Cong., 1st sess.]

A BILL To amend the Act of August 6, 1958 (72 Stat. 497), relating to service as chief judge of a United States district court

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act of August 6, 1958 (72 Stat. 497), is amended by changing the first comma to a period and by striking all of the remainder of the sentence.

The Chair now recognizes the junior Senator from Utah who is the principal sponsor of the bill, and at whose request this hearing was scheduled. Senator Garn, you may proceed.

Senator GARN. Thank you very much, Mr. Chairman. I do have a very lengthy statement with a large number of inclusions. I would like to summarize the statement and ask that it be included in its entirety in the hearing record and that all of the attachments, letters, and editorials also be included in the record without me taking the time of the subcommittee to read all of them.

Senator BURDICK. They will be so received without objection.

[The above referred to statement with attachments follow:]

STATEMENT OF SENATOR JAKE GARN BEFORE THE SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY OF THE SENATE JUDICIARY COMMITTEE ON S. 1130

Mr. Chairman: Let me begin by expressing my personal gratitude to you for scheduling this hearing. The assistance of the distinguished Ranking Minority Member is also greatly appreciated. This hearing has been sought for years by leading members of the Judicial Branch, the Bar, and concerned citizens, and on behalf of these interested parties I express my sincere thanks.

S. 1130 will repeal the exemption to 28 U.S.C. 136 which now allows the Chief Judge of only one United States District Court[1] to maintain his chief judgeship after age seventy. Other witnesses will provide information of a specific nature concerning the Judge's court administration and I will supplement that information—leaving details to the experts. I will provide the Committee with background information, policy considerations, and the sentiment of Utahans who resent and regret the way the United States District Court for the District of Utah is being managed.

[1] Some question has arisen concerning the number of district court judges affected by passage of S. 1130. The Administrative Office of the United States Courts has confirmed that Chief Judge Willis Ritter of the United States District Court for the District of Utah will be the only judge affected. Letter from R. Glenn Johnson, Chief, Division of Personnel, to Jake Garn, Feb. 6, 1976.

On April 4, 1957, the Committee on the Judiciary of the House of Representatives reported to the full House H.R. 985, a bill to require the relinquishment of the office of chief judge of federal courts at the age of seventy-five years. The bill was accompanied by Report No. 301 which contained the recommendation of the Committee that the bill pass as amended. The Committee proposed two amendments: first, that the age of relinquishment be raised from seventy to seventy-five years, and second, that no judge act as chief judge until he has been a member of the court for one year. The report also contained documents showing the approval of the Judicial Conference of the United States, the House of Delegates of the American Bar Association, the Attorney General's Conference on Court Congestion and Delay in Litigation, and the Department of Justice for the seventy-year relinquishment date of the original bill.

The Committee had adopted the amendment raising the relinquishment age to afford "proper flexibility," which presumably means that the impact on judges and courts would be less severe when the Act took effect than if a seventy-year relinquishment date had been retained. Although the House Committee extended the date by five years, the basic policy of the bill remained the same:

"It is the opinion of the committee that the enactment of H.R. 985, as amended, will improve the administration of justice in the Federal courts. There can be no doubt that many judges who have passed the age of 75, do, are capable of doing, excellent work in their judicial capacity, and indeed may well function as efficient administrators of the business of their courts. Nevertheless, it cannot be denied, as indicated in the experience of private business, that the toll of years has a tendency to diminish celerity, promptitude and effectiveness. H.R. Rep. No. 301, 85th Cong., 1st Sess. 2–3 (1957)."

Following the unanimous report of the Committee on the Judiciary, the House considered H.R. 985 on May 23, 1957, and passed the bill as amended by voice vote after a motion to recommit failed 47 to 292. 103 *Cong. Rec.* 7575–6 (1957).

During the debate preceding passage of the bill, the following exchange occurred which helps explain the amendment of the House Committee:

"Mr. FEIGHAN [Ohio] . . . [I]t seems to me reasonable that the age limitation be reduced to 70, so that undue burdens would not be placed upon these elderly distinguished jurists.

"Mr. WALTER [Pennsylvania (and author of the bill)] I strongly suspect that within a very short time there will be an attempt made to amend the bill, because actually, as the gentleman well knows, there were two judges who did not want to be relieved of these duties because they felt that by so doing perhaps some of the patronage that they enjoyed might be interfered with. That was the reason the age was changed from 70 to 75. *Id* at 7571."

This dialogue is included here so that we may better understand the motivations behind the Committee amendment—the motivations were political, rather than policy. Political motivations and considerations are often justifiable, and sometimes commendable, but they must not be confused with policy justifications unless there is some identifiable nexus. I can find no nexus is this case. The amendment was not made in the interest of improving the administration of justice since it was contrary to the recommendation of the experts in judicial administration and inasmuch as it was admittedly offered to allay the opposition of two judges. I emphasize that these facts do not demonstrate that the amendment was unwise, only that it was politically motivated.

Following passage in the House, H.R. 985 was referred to the Senate Judiciary Committee which recommended the bill's passage with one technical amendment. *See*, S. Rep. No. 1780, 85th Cong., 2nd Sess (1958). The bill passed the Senate on July 8 by voice vote.

The following day, Senator Church of Idaho entered a motion to reconsider the vote whereby H.R. 985 was passed and said motion was entered without objection.

On July 28, 1958, Senator Church called up his motion to reconsider and by unanimous consent the bill was reconsidered. At that time, Senator Eastland offered two amendments, the second of which is the so-called "grandfather clause." The first amendment changed the relinquishment age back to seventy years, and the second amendment provided" . . . the amendment made by section 136 [relating to district courts] shall not be effective with respect to any district having two judges in regular active service so long as the district judge holding the position of chief judge of any such district on such date of enactment con-

tinues to hold such position." 104 *Cong. Rec.* 15250 (1958). "These amendments," explained Senator Eastland, "meet the approval of the Administrative Office of the United States Courts and meet any known objections to the bill." *Id.* The amendments were agreed to and the bill passed by voice vote.

On July 30, the House concurred in the Senate amendments and on August 6, 1958, the President approved and signed H.R. 985.

The legislative history is given for the twofold purpose of acquainting members of this Committee with the general background of Section 3 of the Act of August 6, 1958 (72 Stat. 497) which S. 1130 will repeal and laying a foundation for challenging the wisdom of continuing the exception created by the "grandfather clause."

I will not attack the principle of "grandfather clauses." It is well known that such clauses are occasionally used to lessen opposition to pending legislation and we recognize that this kind of compromise allows prompt legislative progress in areas that otherwise would receive no attention, or at best delayed attention. Such procedures are sometimes praiseworthy—falling within the best tradition of democratic compromise—and I do not doubt that such was the case with the Act of August 6, 1958 (also, P.L. 85-593). It is clear that Senate and House amendments were proposed and adopted to allay political opposition to the unamended bill, and I think it equally clear that if such opposition would have defeated the unamended bill then the Congress showed wisdom in passing the compromise version. Further, Mr. Chairman, I may say that I am sympathetic with your sentiments expressed to me in a recent letter: ". . . I believe that it is bad policy for the Congress to renege on a grandfather provision which is adopted in order to allay opposition to a bill." Letter from Quetin N. Burdick to Jake Garn, December 1, 1975. There is wisdom in your desire to keep commitments.

The above statements, however, are general statements—statements that must permit exceptions. And just as in 1958 when circumstances persuaded Congress to permit an exception to the general rule that chief judges relinquish that role at age seventy, so today the facts compel us to adopt another exception and repeal this "grandfather clause." This exception need not be based on political reality, but can stand on merits of fact, reason, and justice.

I have stated that "grandfather clauses" are sometimes necessary and acceptable, I have also agreed with the Distinguished Chairman that they ought not to be reneged except under unusual circumstances, but I am resolved to see this particular clause revoked because this situation contains more than enough facts to classify it as "unusual." The following facts and policies have convinced me that S. 1130 should pass and that this Committee ought to repeal any "grandfather clause" when the weight of evidence becomes as burdensome as it does in this case.

I. S. 1130 ought to pass because the same organizations that supported the original act—and its amendments—now support repeal of the clause of exemption. Who were those organizations that supported H.R. 985 in 1957 and 1958? The Judicial Conference, the A.B.A., and the Department of Justice: the most objective, deliberative, and influential entities of the American judicial system. What organizations now support S. 1130? The Judicial Conference, which says:

"The Judicial Conference believes that this exception, . . . has outlived its usefulness and should be eliminated. Letter from Rowland F. Kirks, Director, Administrative Office of the United States Courts to Carl Albert, Speaker of the House of Representatives, September 21, 1973, appended to this statement. *See also*, letter of confirmation from Rowland F. Kirks to Jake Garn, May 7, 1976."

The Department of Justice, which says: "The Department of Justice concurs in the recommendation of the Judicial Conference that this legislation be enacted. Letter From W. Vincent Rakestraw, Assistant Attorney General, to Peter W. Rodino, Jr., Chairman, House Judiciary Committee, May 2, 1974, appended to this statement."; and—although the House of Delegates of the American Bar Association has taken no specific stand on repeal of the clause—it is believed that its position has not changed from 1957 when it supported a bill identical to H.R. 985, as introduced, *i.e.* with a relinquishment date set at seventy years and *without* a "grandfather clause." The Committee on Federal Judiciary said:

"Your committee is of the view that this legislation is desirable and should be enacted. Accordingly, it recommends that the house of delegates adopt the resolution endorsing [the identical bill]. H.R. Rept. No. 301, 85th Cong., 1st Sess. 4 (1957)."

The House of Delegates adopted the language.[3]

II. S. 1130 ought to pass because the above-cited eminent authorities are joined by other leaders of the bar and bench in calling for its passage. Chief Judge David T. Lewis of the United States Court of Appeals for the 10th Circuit says:

". . . I have publicly supported earlier versions of this Bill as a member of the Judicial Conference . . . but such efforts have been to no avail. . . . [T]he Bill has merit and should be enacted . . . and my support for it is not dependent on any personal opinion as to whether Judge Ritter is a good, bad, or indifferent judge. Letter from David T. Lewis to Jake Garn, April 2, 1975, appended to this statement as are the following four documents."

Calvin L. Rampton, Governor of the State of Utah, says:

"I feel [S. 1130] should be passed. If it were passed, in my opinion it would result in improved administration and supervision of the calendar in the United States District Court for the District of Utah. Whether the "grandfather clause" was ever justified from a standpoint of principle is questionable. Undoubtedly, it was adopted as a matter of expediency to facilitate the passage of the act. However, if it were ever justified now that there is only one Judge serving pursuant to the "grandfather clause", and he is a substantial number of years beyond the cut-off age, the continuation of the "grandfather principle" can no longer be justified. Letter from Calvin L. Rampton to Jake Garn, May 10, 1976."

Erwin N. Griswold, former Solicitor General of the United States, says:

"The situation with respect to the Chief Judge in the United States District Court in Utah is unique, and, I think, unfortunate.

"The basic policy of 28 U.S.C. 136—namely, that a judge shall cease to be Chief Judge upon reaching the age of 70—is sound, as has been shown by a great deal of experience in our judicial system. It is quite unwarranted, it seems to me, to have a special provision in our statutes which makes this policy inapplicable in a single case. The time has clearly come, in my opinion, when that exception should be repealed, and the same rule should be applicable in Utah as in all of the other States of the Union. Letter from Erwin N. Griswold to Jake Garn, July 10, 1975."

The Utah State Bar has gone on record twice favoring repeal of this "grandfather clause." On January 11, 1974, a resolution was passed at the Mid-Winter meeting of the Bar authorizing a secret poll of the Bar membership concerning this issue. 77.7% of those responding favored repeal. Similarly, at the Mid-Winter meeting in January, 1976, the Utah State Bar passed a resolution by a vote of 106 to 62 stating . . . the official action of those members of the Utah State Bar assembled . . . is affirmed to be in favor of S. 1130.

Copies of properly signed and attested resolutions are appended.

III. S. 1130 ought to pass because its passage would not frustrate Congressional policy intent as established in 1957 and 1958. We must remember that H.R. 985 passed both the House and the Senate without the "grandfather clause" and was apparently acceptable to both bodies for over a year until the bill was reconsidered and amended for political reasons. It is true that the bill as passed by both Houses (before reconsideration) contained a relinquishment age of seventy-five years, but the sitting chief judge in the Federal District Court for Utah is seventy-seven years old (having been born January 24, 1899) and would have had to relinquish his chief judgeship nearly two and one-half years ago even if the more liberal version of the bill had been signed. Unfortunately, that version passed both Houses without being signed. I caution us against assuming that S. 1130 will frustrate the intention of the 85th Congress. It will not as the record shows.

IV. S. 1130 should pass because the policy forecasts given by Senator Eastland in 1958 for adoption of the "grandfather clause" have proven to be just the opposite of what he reasonably expected them to be. In proposing adoption of the "grandfather" amendment, Senator Eastland said:

". . . [I]n a district having only two judges, the administrative duties are not such a heavy burden upon the chief judge and do not require him to spend a substantial part of his time in pursuing duties other than judicial. For this reason, it is deemed desirable not to change the present relationship of the

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[3] Relevant by analogy is the Report of the Standing Committee on Federal Judiciary of the A.B.A. which recommends that persons not already in the Federal judicial system not be recommended for district or appeals court judge if over the age of 64; a district judge over the age of 68 who is being considered for appointment to an appeals court "will be considered not qualified by reason of age." *Proceedings* of the 1970 Midyear Meeting of the House of Delegates, p. 206.

judges in districts where there are only two judges in active service. 104 *Cong. Rec.* 15250 (1958)."

The fact is, Mr. Chairman, that this expectation has not come to pass and that the experience of two-judge district courts has been sufficient to show that any amendment to the 1958 bill should have specifically *included* two-judge courts, not specifically exempted them. This conclusion is reached on the basis of the experience of many, including the man who has perhaps been most affected, A. Sherman Christensen, Senior United States District Judge who formerly was in active service with Judge Ritter in the United States District Court for Utah. Judge Christensen explains the dilemma of the two-judge court as follows:

"When the grandfather clause was originally approved by the Congress, there could have been an impression that in two-judge courts the general rule for chief judges to step down at the age of 70 was not as important as in larger courts. My experience and observation has demonstrated that the application of the general rule may be more important in two-judge courts than in larger courts where rules may be adopted by majority vote of the judges and inconsiderate decisions with respect to supporting personnel may be controlled by majority vote. In a two-judge court, if the judges cannot agree upon generally applicable local rules of court, no such rules can be adopted without intervention of the Judicial Council, and in the event of disagreement among the judges in a two-judge court concerning the employment or discharge of supporting personnel and with respect to various other decisions on which the majority of the judges in larger courts have final say, in a two-judge court the chief judge has unrestricted power. Letter from A. Sherman Christensen to Jake Garn, May 11, 1976."

James L. Treece, United States Attorney for the District of Colorado, adds a brief, but definitive, confirmation:

"I see no valid basis for distinguishing between large and small districts in providing for the tenure of chief judges. History has shown, in fact, that a tragic mistake occurred when the exception was made. Letter from James L. Treece to Jake Garn, May 11, 1976."

V. Perhaps the most important reason that S. 1130 ought to pass is the failure of Judge Ritter to maintain acceptable standards of judicial conduct. Surely any judge who continues to serve as chief judge under the provision of a "grandfather clause" that now applies solely to him ought to be required to maintain at least "acceptable" standards of judicial conduct, pertaining both to his duties as chief judge and his regular duties as a federal district court officer. This is minimum standard of conduct, I believe.

The ideal would be an expectation that any judge so protected and exempted would maintain exemplary standards of conduct. Congress can reasonably expect that when it carves out a special exemption in the law for a certain class of persons that those persons act in a manner consistent with their special legal status. If "exemplary" conduct is too high a standard, then it is reasonable to require at least "acceptable" behavior.

Further, the standards of conduct can be applied to the judge's total behavior, not just his behavior in the area in which he operates under the statutory exemption. That is, when Congress creates an exemption for certain chief judges, it ought to maintain that exemption only so long as the exempted judges maintain standards of "acceptable" behavior both in their capacity as chief judges and in their capacity as active federal judges. I believe the standard of conduct as to the chief judgeship is self-evident: if a judge is not adequately performing his duties as chief judge he renders himself unfit to serve under a special statutory exemption. This rule is based on fair play; political exemptions may be necessary, but they need not be maintained in spite of persistent abuse. My belief that even non-chief judgeship duties (*i.e.* non-administrative duties) are relevant in determining whether a statutory exemption which relates solely to the chief judgeship ought to continue is based on the belief that Congress has an affirmative duty to end privileges and perquisites specially extended when abuse occurs in an area so intertwined with the chief judgeship that performance in one area cannot be separated from performance in the other. What kind of cockamamie reasoning is it which argues that a special, one-man exemption should be continued after it has been shown that the only man still serving under the exemption abuses both his administrative and regular judicial duties? Must

we continue to reward intemperate and injudicious behavior with a special exemption? I earnestly hope we do not.

Let me give one example of the problems we have with the administration of the Utah Court. In 1957, a formal request to divide the business of the U.S. District Court for Utah was submitted to the Judicial Council. The request came from disputing judges Ritter and former active (now senior) district judge, A. Sherman Christensen. On January 20, 1958, the Council issued an order setting out the manner in which cases in the Utah Court would be divided. For example, civil cases were to be assigned in the following manner: the clerk of the court was to take between fifty and one-hundred cards and write "chief judge" on half and "associate judge" on half. The cards were then to be shuffled and placed in opaque envelopes and the envelopes were to be numbered so as to correspond with the next fifty to one-hundred cases to be filed. This was to be done in such a manner as "no one shall know the designation appearing on such card." Thereafter, as each case was filed, the clerk would take an envelope from the place where they had been safely kept and assign the case to the judge whose name appeared on the card in the envelope. *In re* Division of Business and Assignment of Cases in the U.S. District Court for the District of Utah, Order of the Judicial Council of the 10th Cir., Jan. 20, 1958.

This order was amended in 1962 by agreement of the district judges and in 1965 by another order of the Judicial Council.

On August 17, 1971, Judge Christensen retired from active service and was succeeded by Aldon J. Anderson who was duly qualified the same day, therefore "no vacancy occurred in the position." By unilateral action, Judge Ritter on October 4, and November 24, 1971, issued orders transferring to himself certain cases previously assigned to Judge Christensen and pending in Judge Christensen's court the day he assumed senior status. By order of December 20, 1971, the Judicial Council of the Tenth Circuit reversed Judge Ritter's unilateral action after determining that Ritter, Christensen, and Anderson had "responded in writing . . . [and indicated] that a controversy does presently exist, and has existed, as to the division of business and the assignment of cases in [their court]."

The Judicial Council further ordered and decreed:

"1. The former order of the Council, as amended, remained in full force and effect and was not 'in anywise affected' by Judge Christensen's retirement;

"2. Judge Anderson was to succeed to all of Judge Christensen's pending cases;

"3. Judge Ritter was ordered to vacate his unilateral orders 'purporting to assign to himself certain cases. . . .';

"4. Judge Ritter was ordered to vacate 'each and every other order that he has unilaterally entered' affecting Judge Anderson's cases unless Judge Anderson 'specifically consents and agrees' to any such order. *In re* Division of Business and Assignment of Cases in the U.S. District Court for the District of Utah, Order of the Judicial Council of the 10th Cir., December 20, 1971."

In a case with parallel issues growing out of the same facts, Utah-Idaho Sugar Company brought a mandamus action in the Court of Appeals to require Judge Ritter to reassign petitioner's case which he (Ritter) had taken through his order of October 4 although the case had originally been assigned to Judge Christensen. In granting the petition, the Court summed up many years of experience in the United States District Court for Utah:

"* * * It was therefore entirely proper for the Judicial Council to declare Chief Judge Ritter's order void. . . . His act of choosing which cases to keep and which to assign to Judge Anderson did not comply with the Council's mandate that the assignment of civil cases be equal and random. . . . In sum then the Judicial Council was justified, first, by reason of the fact that Chief Judge Ritter acted unilaterally and not in conjunction with Judge Anderson, and, secondly, because there was continued disagreement between the judges of the district. We find and conclude that this writ of mandamus is essential to continuation of fair division of cases within the District of Utah and in implementation of the prior orders of the Judicial Council. *Utah-Idaho Sugar Co.* v. *Ritter*, 461 F. 2d 1101, 1104 (10th Cir. 1972)."

Let me turn now to a criticism of Judge Ritter that does not directly concern his administrative work, but does seriously concern his general judicial role, and therefore the justification for his continued protection under the "grandfather clause."

This criticism concerns Judge Ritter's restrictive grand jury policies that continually hamper the administration of federal law in Utah.

". . . [I]n the past five years, a grand jury has met in Utah's central district only 81 days. During 1972, grand juries sat only on day, during 1973 not at all.

"That record is in sharp contrast to neighboring jurisdictions. In Arizona, two grand juries are always impaneled, and sometimes there are as many as four. In Colorado, a grand jury is always impaneled, and a second one has been called if needed for spercial investigations.

"Spokesmen for the offices of the U.S. attorneys in thore states said they had never heard of their grand juries being limited to specified cases [as Judge Ritter did with the 1975 Utah grand jury]. Nor, so far as they knew, had federal judges in their states arbitrarily dismissed grand juries before their term was up [as Judge Ritter did]. Decker, 'Ritter Blocks Juries,' Deseret News, December 10, 1975."[1]

The Decker article was written shortly after Judge Ritter dismissed a grand jury that was investigating what one juror called "a very large, involved case." On December 4, 1975, the day the grand jury was dismissed, the following dialogue took place after the Judge had dismissed the jury:

"The FOREMAN. Could I take a moment of your time, please?

"The COURT. Sure.

"The FOREMAN. The Grand Jury would like to thank you for the opportunity that we have had of serving as federal grand jurors in representing the people of the United States of America; but we are deeply concerned, and we have been for some time about the fact of unfinished business.

"We haven't felt it a hardship, you know, to meet and to act in this capacity; and we would like to at this time, with your permission, to complete the investigations that we still haven't completed.

"The COURT. Well, I think I'm acquainted with that, and I've already alluded to it. So we will do as I say. You're discharged. Go to the Clerk's Office."

Report of the Grand Jury, United States District Court for for the District of Utah, December 4, 1975, at 26–7.

According to news accounts, the Grand Jury was not aware of any deadline and was surprised by the dismissal. The foreman of the Jury was quoted as saying, "We didn't know of any deadline. The jurors were unaware of any deadline." "Grand Jurors Miffed at Ritter's Ruling," Deseret News, December 5, 1975. Another grand juror estimated that it would take "roughly three months" to present the case to another grand jury.

The U.S. Attorney pursued appropriate and timely remedies without success. On December 4, 1975, he filed a request that the Grand Jury impaneled on February 10, 1975 (and dismissed on December 4, 1975) be permitted to continue to sit. The request was ignored. On January 23, 1976, the U.S. Attorney filed a motion for impaneling a grand jury. Again, Mr. Child was ignored. On April 20, 1976, the U.S. Attorney filed a Petition for Writ of Mandamus with the United States Court of Appeals for the Tenth Circuit, requesting that court to issue an order compelling the convening of a grand jury and to order certain protections. Mr. Child was joined in the petition by Richard L. Thornburgh, Assistant Attorney General, Criminal Division, and Mr. Thomas E. Kauper, Assistant Attorney General, Antitrust Division. On April 23, Judge Ritter signed orders calling members for a new grand jury, therefore mooting one of the points of the Petition for a Writ of Mandamus. The circuit court maintained jurisdiction over other requests of the petition, including that the Grand Jury be allowed to sit for its full term unless both the U.S. Attorney and the foreman agree to an earlier dismissal; that the Grand Jury be permitted to investigate any matter it deems proper; and that the Court be required to sign and enforce all immunity orders obtained in accordance with law. Petition for Writ of Mandamus, *United States v. Ritter*, (10th Cir. April 20, 1976).

Mr. Chairman, time and space do not permit further discussion of these problems or other problems that trouble our district court, but these two areas of concern—assignment of cases and grand jury impaneling—will give the Committee an idea of the obstacles facing those of us who seek a better brand of justice in the United States courts in Utah. Appendix I of this statement includes three articles from a recent issue of *Utah Holiday* Magazine that detail some of the Judge's problems with the press, the Bar, the Court of Appeals, and others.

[1] *See also*, Affidavit of Lois Grossbeck, administrative clerk and custodian of the grand jury minute book, which shows only 57 days of grand jury work since March of 1971. *United States v. Willis W. Ritter*, Appendix to Petition for Writ of Mandamus, p. 1 (10th Cir. Apr. 20, 1976).

VI. Finally, S. 1130 ought to pass because the facade of detached impartiality and judicial sufficiency has crumbled from Willis W. Ritter. Utahans no longer understand—if indeed they ever did—why this man continues to receive special and *unique* protection from the simple rules that apply to everyone else. We yearn for an equal treatment, and it ought to start with judicial fairness.

Let me share with you part of the parade of items that fill my files. I will take just one item from each month in 1976.

On January 18, 1976, the Ogden, Utah *Standard-Examiner* editorialized "Time Has Come for Federal Judge Willis W. Ritter to Step Down." On the 27th of that month the same paper carried a letter from Val "J" Hallstrom of Sandy, Utah which concurred with the editorial. Mr. Hallstrom said:

"* * * I had the displeasure of observing Judge Ritter . . . a few months ago and still can't believe what I saw and heard in his court. Before I spent time as an onlooker in his court I believed in only one God, now I believe there [are] two.

"* * * I wonder how many individuals who have appeared before Judge Ritter and their loved ones feel about having faith in the judiciary system[?] * * * You say have faith in the judiciary system, Mister, he is the system."

Letter from Val J. Hallstrom, Ogden *Standard-Examiner*, Jan. 27, 1976.

In February 1976, I received a letter from a constituent who complained of the treatment his father had received before Judge Ritter. Names, dates, and other identifying information in this letter and the following two letters will not be revealed because I do not have the writers' permission to do so and because I am afraid that disclosure will work to their prejudice. The letters for February, March, and April follow:

"If you think he [Judge Ritter] has abused defense attorneys before, get and read the transcript of [case name omitted]. Ritter has put my father, [name omitted] in the hospital with a near massive heart attack. If you can get ahold of that transcript (good luck, because we couldn't) you might even have your evidence for a full-scale impeachment. It was so bad in court on [days and dates omitted] that we even suspect Judge Ritter of ordering the transcript destroyed. The reporter would give no reason, but he said he could not make a copy of the transcript for us."

The March entry in this parade is from a California attorney:

"It was shocking to me the evidence which was kept from the trial and the various rulings which the judge made which I felt were inconsistent, not only with morality, but sound principles of law.

"His submission to the jury was probably the most inflammatory piece of judicial work that one could imagine and, although this matter is in the Appellate Courts at the present time, I wish to compliment you for your attempt to bring about a much more equitable judicial system under which citizens may litigate their various issues and disagreements at law.

"This case is probably the most flagrant abuse of judicial discretion which we have been apprised on in the last 15 years."

The March entry comes from a Utah attorney:

"I recently completed a trial before a jury in Judge Ritter's court. The tyranny that takes place within those walls cannot be felt by or described to others who do not witness it. When a description is attempted the listener simply shakes his head in disbelief. The abuse of Utah citizens who are called as jurors is painful to observe. Litigants who have the misfortune to find themselves in his court are battered from side to side at the judge's irrational whim. Witnesses are ridiculed and dimissed, hardened criminals are allowed to go free because of an expressed hatred the judge has for the United States Attorney. The list can go on and on."

The examples for May are contained in Appendix II.

Let me conclude with the conclusion of another: Joseph C. Goulden, author of a recent book on federal judges. After discussing Judge Ritter for several pages, Mr. Goulden says:

"At one point I had decided that Judge Willis Ritter, the perpetual-fury machine of Salt Lake City, deserved the honor [of ultimate Expletive Deleted judge of the federal courts]. Ritter's bad temper, however, seems to be fired by age and whiskey more than by innate meanness and, as is true of any ricocheting object, he occasionally lands on the right side of an issue."

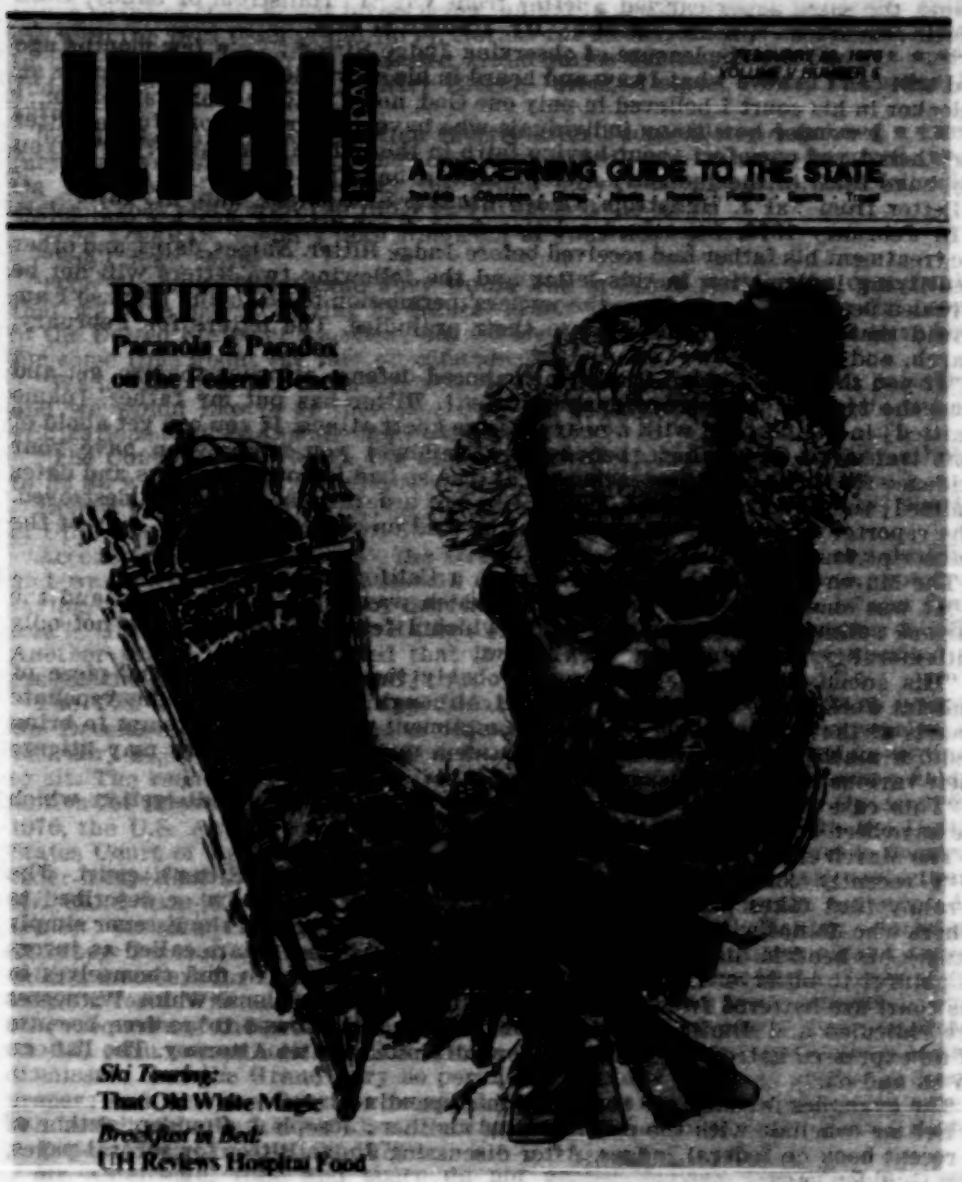
J. Goulden, *The Benchwarmers*, p. 378 (Ballantine Books: 1974). Judge Ritter had to settle for second; first place went to a Los Angeles judge.

These kinds of points are made over and over in letters, in newspapers, and now in books. It's time we no longer reward such behavior with special "grandfather" protection. This is the very *least* that can be expected of a government of laws.

Mr. Chairman, what more can be said? Who else needs to speak? What further actions need to be taken? How much more time needs to pass? "The condition in the State of Utah has been a scandal among the Bar in Utah and Idaho and the Western States for many years." [4] Let's take the time *now* to correct it.

Thank you.

[4] Letter from Marion J. Callister, United States Attorney for the District of Idaho, to Jake Garn, May 12, 1976.



PARANOIA AND PARADOX ON THE FEDERAL BENCH

"Chief Judge Willis W. Ritter has established a reputation as one of the most cantankerous and frequently overturned jurists in American jurisprudence."

(By M. Dallas Burnett and Nelson Wadsworth)

At first glance, the short, rotund man with silvery white hair appears jovial and kindhearted. Dress him in a red, fur-lined suit and a beard and he could easily pass for Santa Claus . . . but not for long.

As he sits in his courtroom in the Post Office Building in Salt Lake City, glowering down at a steady parade of lawyers, defendants, witnesses and law enforcement officers, his demeanor quickly dispels the notion and image of a good-humored government St. Nick.

In 25 years on the Federal bench, Chief Judge Willis W. Ritter has established a widespread reputation as one of the most cantankerous and frequently overturned jurists in the history of American jurisprudence.

One California lawyer, his legal pride recently trampled underfoot in Ritter's courtroom, put it this way: "That Federal judge in Salt Lake City has got to be the meanest s.o.b. east of the Pacific Ocean . . ."

On the other hand, a handful of respected Utah lawyers—most of them Ritter's friends—call him "one of the most brilliant legal minds on the Federal bench." They claim the judge's irrascible image was created by a hostile press in retaliation for the bullying reporters and photographers receive in his court.

The press' view of Judge Ritter has resulted in the coining of a new word in Utah legal circles, "Ritterisms." These are the legions of stories, incidents and timely little anecdotes that surround the legendary life of the 76-year-old jurist, making him one of the most controversial judges in the Federal judicial system. "Ritterisms" would fill volumes, but here are a few examples:

Once in 1952, the judge had the U.S. Marshal haul the postmaster and scores of postal employees before the bench, threatening to hold them in contempt if they failed to silence some noisy mail elevators that "sounded like a bowling alley and disturbed the peace of the court."

Another time he banned cameras and tape recorders from the entire Federal building to "protect the rights of defendants and witnesses who did not want to be photographed or interviewed."

In 1969 he consolidated 69 habeas-corpus and civil rights cases filed by inmates at Utah State Prison. The order turned the second floor of the Post Office building into an armed camp as the heavily-guarded convicts were brought into the courtroom en masse.

In another case, Judge Ritter ordered a divestiture plan in the far-reaching El Paso Natural Gas-Pacific Northwest Pipeline antitrust action which was rejected by the U.S. Supreme Court. In handing down the decision, the high court ordered the federal judge in Utah to remove himself from the case because of prejudice, an almost unheard of procedure in Supreme Court opinions.

Once in 1973 the judge issued a 10-day restraining order prohibiting police from issuing parking tickets in downtown Salt Lake City. Although the order was later overturned by the 10th Circuit Court of Appeals, it created temporary traffic chaos in the heart of the Utah capital city.

And just two months ago, Judge Ritter dismissed a Federal Grand Jury right in the middle of what jurors called "a most important criminal investigation." He abruptly called the panel into his courtroom and without explanation ordered it to go home.

Ritter's ban on photographers and artists in his courtroom deserves further comment because it illustrates his treatment of newsmen. The gap between the judge and the press culminated in the celebrated "TV sketching case" in 1973. Salt Lake City media, true to form, fearfully sidestepped any confrontation with the judge.

The story unfolded just three years ago this month when a Salt Lake City television station broadcast sketches of a trial underway in Judge Ritter's court, apparently in violation of a 1969 order prohibiting drawings. A few days later station management and certain news personnel found themselves facing a contempt citation.

During the contempt hearing, it was discovered the sketches had not been drawn in the courtroom. They were done from memory after the artist had visited the court. The judge conceded that the television news people may not have totally understood his order about courtroom sketching, so the contempt citation was not pressed. But the sketching order was promptly amended so no one else could misunderstand its intent.

The new order, issued Feb. 2, 1973, talked about a ban on drawings, "whether the cartoons, artists' sketches, caricatures, or whatever they may be called, are made on these premises or elsewhere."

That order gave the Utah Federal District Court the distinction of being the only one in the United States where sketching from memory is prohibited. Only the state courts of Rhode Island also prohibit in-court sketching.

The only other Federal court issuing an order similar to Judge Ritter's was in Florida, also in 1973. That judge was told by the Fifth Circuit Court of Appeals, however, that the rule was inappropriate and that "persons are permitted to unobtrusively make sketches within the Courtroom during public sessions . . . or to sketch from memory and thereafter publish, or both."

Unfortunately, the Utah rule was not challenged so there has been no opportunity for a higher court to rule on its constitutionality. There is little doubt that it would not stand up under a legal challenge.

The neglect of the newspapers and broadcasters in Salt Lake City in this matter may be just as serious as the judge's order. The late Supreme Court Justice Hugo L. Black probably put his finger on this sort of media attitude in a 1967 case comment: "If there is any one thing that could strongly indicate that the Founders were wrong in reposing so much trust in a free press, I would suggest that it would be for the press itself not to wake up to the grave danger of its freedom."

The First Amendment to the United States Constitution, along with the Fourteenth Amendment, prevent the federal government and the states from restraining publication or otherwise interfering with the rights of free expression. Those rights, of course, are not absolute, and there are some areas of expression like sedition, obscenity and libel that may be punished after the fact. But preventing publication in advance has always been unacceptable to the U.S. Supreme Court except in a few rare instances.

The Ritter order, it should be remembered, is a prohibition against reporting. In other words, the judge not only says what can take place in his courtroom, but he is dictating, at least in a narrow area, what may be reported.

Several illustrations may serve to put the sketching ban in perspective against the backdrop of First Amendment guarantees.

In a 1972 case in Baton Rouge, La., a federal district judge said there could be no report carried by newspaper, radio, or television of the testimony of a specific day. That order was struck down by the Fifth Circuit Court of Appeals in rather forthright language: ". . . a blanket ban on publication of Court proceedings so far transgresses First Amendment freedoms that any such absolute proscription 'cannot withstand the mildest breeze emanating from the Constitution' . . . Censorship in any form—judicial censorship included—is simply incompatible with the dictates of the constitution and the concept of a free press."

Judge Ritter made an interesting and humanitarian argument for his sketching ban. He suggested that people have a right to come to the court "without being held up to degradation by grotesque representations of their physical characteristics . . . and a constitutional right . . . to be free from being made a public display of."

His concern for the privacy and welfare of those who do business in his court may be ethically laudable, but it hardly stands as a legal right. There are neither statutes nor case law that grant a "constitutional right" to be free of publicity when you go before the federal courts. Even if one accepts the presumption that all courtroom drawings are "grotesque representations" and subject a person to "ridicule," the laws of privacy and libel, as interpreted by the Supreme Court, prevent recovery unless it can be shown that the statements or pictures are made with actual malice.

The most telling argument against this order forbidding an artist from leaving the courtroom, drawing the scene from memory and then having that sketch televised is the First Amendment itself.

"A trial is a public event," according to Justice William O. Douglas in a 1946 case. "What transpires in the courtroom is public property . . . Those who see and hear what transpires can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government to suppress, edit, or censor events which transpire in proceedings before it."

Since the person who draws in a courtroom can do so, if he desires, with little more distraction to the participants than the person who takes pencil notes, it is unnecessary that the physical act of drawing interfere with the proceedings. The drawing is simply another technique for reporting court activities.

In striking down the federal government's attempt to censor the Pentagon Papers in 1971, the Supreme Court said that a prior restraint on expression carries a "heavy presumption against its constitutional validity." The weight of the presumption is established by the rarity of cases sustaining any activity that could be considered prior restraint.

Judges can impose prior restraints that are constitutional only in extreme and limited circumstances. The circuit court that knocked down the sketching order in Florida said, "Before a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be an 'imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.'"

It is obvious that the gag order on sketches was not designed to protect from some terrible danger to the administration of justice. It was directed at getting privacy for the people coming to the courts and keeping the media out of the province that the judge considered exclusively his.

That hardly justifies the prior restraint.

In contrast to the Utah media's example, one eastern newsman boldly delved into Judge Ritter's alleged "ecumenical meanness." Investigative reporter Joseph Golden, formerly with the *Philadelphia Inquirer* and now a free-lance writer in Washington, D.C., recently wrote a book entitled *The Benchwarmers*, in which he explored the temperaments of the country's Federal judges, including Judge Ritter. In one chapter, Golden wondered if any of the jurists he had been writing about would qualify for the title of "ultimate Expletive Deleted judge of the Federal courts?"

"At one point I had decided that Judge Willis Ritter, the perpetual-fury machine of Salt Lake City, deserved the honor," Golden wrote. "Ritter's bad temper, however, seems to be fired by age and whiskey more than by innate meanness and, as is true of any ricocheting object, he occasionally lands on the right side of an issue. Let me say that again: Ritter sometimes makes a humanitarian decision, but maybe only because he is madder at the bad guys in the case than he is at the good guys."

And so Golden passed over Judge Ritter for the dubious "ultimate Expletive Deleted" title and gave it instead to Judge Charles Carr of Los Angeles.

For many people in Utah, however, Judge Ritter has been in the process of earning such a title ever since a series of heated Senate hearings in 1949 and 1950 ended in confirmation of his appointment by President Truman. Emotions about the judge's courtroom conduct have simmered behind the scenes for years in the law offices in Salt Lake City, but it wasn't until 1973 that the Utah State Bar would publicly acknowledge there might be a problem. In that year, at the association's annual meeting in Provo, the public debate over Ritter's alleged "irregular conduct" and supposed "bias" against certain lawyers began.

Calvin Behle, a well-known lawyer in Salt Lake City and then Utah delegate to the House of Delegates of the American Bar Association, introduced a resolution to ask Congress to repeal the "grandfather clause" in the Judiciary Retirement Act of 1958. This clause had initially been tacked onto the Act as an amendment in the Senate, allowing Idaho Democratic Senator Frank Church's father-in-law to continue to serve as chief judge after retirement age. Under the act, federal judges must retire from chief judge status at age 70, except then incumbent chief judges in two-judge districts. Currently, Judge Ritter is the only one left on the bench. If the clause is repealed, he would remain as a Federal judge, but would have to relinquish his administrative powers, including the power to assign cases.

Behle's resolution was adopted by a 2-to-1 margin. But only about 100 of the Utah Bar's 1,383 members were at the convention. Some pro-Ritter lawyers were enraged by the move.

"The entire business was carried out in a most shoddy and illegal manner," declared John J. Flynn, University of Utah law professor. "Such a procedure would do credit to those who planned Watergate and is just as unfair, illegal, and unethical." He also called it a "sneaky, underhanded attack on the independence of a Federal judge."

The association's Board of Commissioners finally determined the resolution had been "improperly introduced" and declared the action in Provo to be "null and void."

"They left me holding the bag," Behle said, shaking his head. "They are afraid because they have to plead cases before Judge Ritter."

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But the Behle resolution didn't die. In secret, statewide balloting authorized at the association's mid-winter meeting a few months later, 815 of the 1,049 lawyers who responded said they favored repeal of the grandfather clause. The Board of Commissioners voted to send copies of the resolution to Utah's congressional delegation.

Then Rep. Wayne B. Owens, a Democrat serving on the House Judiciary Committee, received the resolution but did nothing. "I'm not going to get caught in the Utah Bar's popularity contest for a Federal judge," Owens said shortly before running on the Democratic ticket for the Senate seat vacated by Republican Wallace F. Bennett. His GOP opponent in that campaign was then Salt Lake City Mayor E. J. "Jake" Garn, an outspoken critic of Ritter.

Shortly before the election, Garn lashed out at the judge's reversal rate in cases appealed to the 10th Circuit Court. "When a Federal judge is overruled 80 per cent of the time," Garn declared, " . . . then it is obvious he is not doing his job. Judge Ritter has also displayed an obvious, strong bias against Salt Lake City in cases that have appeared before him. We feel we cannot get a fair hearing in his court."

Garn went on to defeat Owens in the 1974 election. Just what effect the Ritter issue had on the outcome is not known, but it may have hurt the Democrat's campaign. At any rate, the Republican senator is now in Washington, pushing for repeal of the grandfather clause.

Garn's estimate of appeals court reversals was based only on a survey of the habeas-corpus cases appealed from Utah. Of 39 cases, 30 were overturned on appeal. Nevertheless, Judge Ritter's overall batting average in the higher courts is a little better.

Deputy Attorney General Robert B. Hansen, another outspoken Ritter critic who is writing a book about the Federal judiciary, claims more than 60 percent of the judge's civil cases either in whole or in part have been reversed by the 10th Circuit Court since 1949. In 284 cases, Hansen said, only 111 have been affirmed.

Hansen's analysis, prepared with the help of retired lawyer Randoph Collins, also showed 43 percent, or 22 out of 51 criminal cases reversed.

Professor Flynn said Ritter had a poor record in what he called "the conservative" Court of Appeals in Denver but had a "fair" record in the Supreme Court. "I don't agree with all his decisions," Flynn said, "but dammit, he makes them, and some pretty tough ones at that. . ."

Despite Flynn's claim, Judge Ritter's record in the U.S. Supreme Court is apparently not impressive either. In at least two cases, the high court instructed him to step aside because of obvious bias and prejudice. In the El Paso Natural Gas antitrust case, Ritter announced from the bench that the government had lost and instructed company lawyers to prepare findings of fact and conclusions of law, which he later signed without change.

"We would have to wear blinders," said Justice William O. Douglas after the subsequent appeal, not to see the illegality of the merger. The Supreme Court then ordered an immediate divestiture of Pacific Northwest Pipeline by El Paso. Later, even with the high court's mandate, Judge Ritter permitted the company to file its own divestiture plan which still reeked of the old monopoly.

Finally, in an unprecedented move, the Supreme Court rejected Ritter's divestiture plan and ordered him removed from the case implying the trial judge's "personal and emotional involvement."

A similar fate awaited the so-called "Indian pony case" in which an impoverished group of Navajos claimed the Bureau of Land Management had rounded up their herds of horses and burros in southeastern Utah and drove them from the range, killing many in the process. The Indians sued the government for $100,000. Following a complicated back and forth exchange with the 10th Circuit Court, and finally an affirmation of Ritter's ruling in the Supreme Court, the case was remanded to Utah to fix damages. Ritter ended up awarding the Indians more than $186,000, nearly double what they had asked in the original complaint.

The government once more appealed, and after much wrangling back and forth, the circuit court and the Supreme Court instructed Ritter to remove himself from the case. In its ruling, the circuit court pointed out Ritter"s emotional involvement and failure to give calm, impartial consideration to the defendants.

Some attorneys in Salt Lake City claim there is a certain group of "fair-haired" lawyers, most of them liberal Democrats, who win every case in Ritter's court. But even some Democrats say they "do not get a fair shake."

"Judge Ritter doesn't stand for any monkey business," says A. Wally Sandack, a Democrat and friend of the judge. "If you go into his court unprepared, or if you try to gas around a lot and act unprofessional, you are in serious trouble."

"If they really want to go after Judge Ritter," adds Professor Flynn, then they should impeach him, as specified by law. But they know damn well there are no grounds for impeachment."

One group did try to have Ritter impeached in 1973, and petitions were actually circulated in Utah. The movement, however, had an extreme right wing tinge to it, and was led by disgruntled plaintiffs and defendants who had suffered defeat in Ritter's court. Their claim that the judge had accepted a $20,000 bribe from a defendant in a felony case was outlined in a "friend of the court" petition filed in the clerk's office, but the U.S. attorney said the accusations were groundless and the public gave the charge little credance. Thus, the impeachment petition fizzled.

Ritter's brush with impeachment is perhaps miniscule compared to his difficulty with Federal Grand Juries. In 1970–71 he was accused of "manipulating" a grand jury called to investigate the Salt Lake County Jail. The late U.S. Attorney C. Nelson Day, shortly before he was killed in a traffic accident last year, told a group of journalism students from Brigham Young University that the judge had hand-picked the jurors, including foreman Maurice Warshaw, contrary to federal law specified for impaneling grand juries.

"When it came time for charges," Day said, "the jury really didn't have anything to go on, but it wanted to return indictments anyway. I refused to sign them, with the backing of the Justice Department. The next thing I knew, Judge Ritter was releasing them to the press."

Another grand jury debacle splashed into the headlines only two months ago when Ritter abruptly dismissed the last term jurors right in the middle of an investigation. Mrs. Tyko (Marjorie) Kangas, who said she was speaking for the rest of the jurors, decried the judge's action as a horrendous waste of taxpayer's money and a grave handicap to federal law enforcement in Utah. "When I walked out of that courtroom I wanted to cry," she declared. "I wondered, 'is this really America?' It seemed to me more like a dictatorship, where the people have no where to turn."

Mrs. Kangas fired off a scathing letter to U.S. Senator Frank E. Moss (D-Utah) who in the past has remained silent on the Ritter matter. The former juror, a registered Democrat, promised to campaign against Moss in the upcoming election if he failed to support repeal of the grandfather clause. Moss, somewhat reluctantly, admitted recently, he thought the time had come for Ritter to step down as chief judge.

During World War II, Ritter was appointed regional director of the Office of Price Administration in Denver, supervising rent controls in Colorado, Montana, Wyoming, Idaho, Utah and New Mexico. In the Senate hearings on his appointment to the bench, one of his colleagues in the OPA, H. Grant Ivins, a former district director, wrote a fiery letter to the subcommittee declaring Ritter an "unfit candidate" for the judgeship. Ivins called Ritter "arbitrary, tyrannical, and arrogant." He said he had talked to many prominent Utah lawyers about the matter and "I have yet to find one who does not say that such an appointment would be little short of a calamity."

Yet the Utah State Bar and Salt Lake County and Weber County Bar Associations endorsed Ritter, and it was their support that enabled Rep. Walter Granger and outgoing Sen. Elbert D. Thomas—who had made the nomination in the first place—to clinch the confirmation.

Repeated attempts to interview the judge usually end in failure. He generally refuses to talk to newsmen. Following the Utah State Bar's poll in 1974, he did grant a rare, brief interview to a Salt Lake City television station. At that time he said he didn't "care two bits" about the Bar's move to take away his chief judge status. "This is a fumbling, bumbling political tactic by a poor chap who is trying to make a political name for himself and has no other issue," Judge Ritter declared. He said Deputy Attorney General Hansen—then a candidate for the Republican nomination for Congress—"Conceived and promoted" the poll among Utah lawyers.

At Zion's Book Store a block from the Post Office, owner Sam Weller says Ritter is one of his best customers. "He is a man greatly misunderstood by the public," Weller adds.

"He is what a Federal Judge ought to be," says another lawyer friend, "an advocate of the law who cannot be blown to and fro by every special interest."

LIST OF ALL CIVIL CASES PUBLISHED IN FEDERAL REPORTER FOR THE 10TH CIRCUIT COURT OF APPEALS IN 1975 WHICH WERE TRIED BY CHIEF JUSTICE WILLIS W. RITTER

R.S.C. log No.	Name	Citation	Disposition
189	American Oil Co. v. McMullin	508 F. 2d 1345	Reversed in part. Affirmed in part.
190	Muller v. U.S. Steel Corp.	509 F. 2d 923	Do.
191	Shuput v. Heublein, Inc.	511 F. 2d 1104	Reversed.
192	Little Red House v. Quality Ford Sales, Inc.	511 F. 2d 210	Reversed in part. Affirmed in part.
194	Slaughter v. Brigham Young University	514 F. 2d 622	Reversed.
195	G. M. Leasing Corp. v. United States	514 F. 2d 935	Reversed in part. Affirmed in part.
196	Redd v. Shell Oil Co.	518 F. 2d 311	Reversed.
197	United States v. Browning	518 F. 2d 714	Do.
198	United States v. Hansen Niederhauser Co.	522 F. 2d 1037	Do.
199	Little Red House v. Quality Ford Sales, Inc.	523 F. 2d 1	Do.

COMPARATIVE STATISTICS 1940–75 OF 10TH CIRCUIT COURT OF APPEALS RELEASES REPORTED IN CASES ON APPEAL FROM JUDGMENTS OF U.S. DISTRICT JUDGES OF UTAH

Judge period	Total cases reported	Civil cases				Criminal cases				Habeas corpus cases [1]			
		Affirmed	Percent	Reversed	Percent	Affirmed	Percent	Reversed	Percent	Affirmed	Percent	Reversed	Percent	Affirmed in part
Ritter, [2] 1949 to 1975	312	111	42	153	58	9	40	19	60	29	76	2	28	3
Christensen, [3] 1956 to 1974	139	82	80	20	20	14	82	3	18	5	15	0	3	0
Anderson, [4] 1972 to 1975	22	15	79	4	21	2	100	0	0	1	0	0	0	0

[1] These cases are also included in the civil case statistics.
[2] Judge Ritter took office on October 25, 1949.
[3] Judge Christensen took office on June 26, 1954.
[4] Judge Anderson took office on August 17, 1971.

Source: The compilation was prepared by Mr. Randolph S. Collins, 2036 Lincoln Lane, Salt Lake City, Utah, from cases reported in the Federal Reporter. He will make available his collected materials for examination by anyone interested in verifying the statistics.

Judge Ritter: The Man & The Myth

"You're dealing with an enigma, there's no doubt about it," concedes a friend. "How can he be both compassionate and rude? He's human and 76."

(by Elaine Jarvik)

The man will not sit for his portrait. And so the artist goes to the man's family and asks: "What about his eyes? Are they brown or blue?" "No comment," says the family. "Why open old wounds?"

And what about the shape of the face? The artist asks the man's friends. "Ah," they say. "The shape of the face. Too private a matter." The artist goes to the man's colleagues. What about the smile? "No smile at all," say some of the colleagues with assurance. "A very big smile," insist the others.

And so the artist does the portrait: One blue eye and one brown; a face that is at once oval and square; a smile that begins as a grin and ends in a sneer.

Judge Willis Ritter did not authorize this "biography," as he would call it. And, to no one's surprise, he refused to be interviewed. But he did relay this message through his daughter: "If you and your editors continue to pursue this matter, you will have to accept the risks and consequences, whatever they may be." In accordance with his wishes, other members of his family have also declined interviews.

What do we know, then about Willis William Ritter, Chief Judge of the U.S. District Court of Utah? That he has lunch very regularly at Lamb's Grill, and also frequently enjoys a Chinese meal. That perhaps his favorite song is Nat King Cole's *Mona Lisa*. That he has watched the entire *Ascent of Man* television series more than once. That he is a very private public man.

It appears certain that this man was born on Jan. 24, 1899 in Salt Lake City, and that soon afterwards his parents moved to what is presently called "The Homestead" in Midway, Utah, but was then called "Ritter's Hot Pots." When he was still a young boy, he moved with his family (eventually to number four children) to Park City, where his father mined, went on strike, and often had to feed his family on credit.

Young Willis did well in high school, was a private in the U.S. Army during World War I, and worked in the mines for one or two years when he was about 20. And sometime either between those occasions or afterwards, he nearly died of the flu. It was while recuperating, he once told a *Deseret News reporter* in one of his rare interviews, that he began reading a law book that was lying around the house. With money earned in the mines, he helped pay his way to law school at the University of Chicago, where he graduated with a LLD in 1924.

In those days it was possible to be admitted to law school directly from high school, and it wasn't until 13 years later, after he had already been teaching for many years as a professor at the University of Utah College of Law, that Ritter went back and got his bachelor's degree from the U. He made Phi Beta Kappa. In 1940 he received a SJD degree from Harvard Law School.

According to *Who's Who*, Ritter practiced law in Chicago, Washington and Salt Lake City for a total of 16 years, some of those while he was also teaching and getting his bachelor's degree. During World War II he served as regional director of the Office of Price Administration in Denver. In 1948 he was nominated for Congress from the Second District (Salt Lake and Tooele Counties) by Democrats. In January, 1950, he was appointed by Democrat President Harry Truman to become Utah's federal judge, after serving an interim term, an appointment bitterly contested by many Republicans, some lawyers, and some members of the LDS Church (some of these fearing he would not rule to their liking). He became chief judge in 1966.

He has four children, two of whom live in Salt Lake. He has a farm in Idaho, is separated from his wife and lives alone in the Newhouse Hotel.

"You're dealing with an enigma, there's no question about it," concedes one lawyer who greatly admires the judge and has enjoyed a long personal relationship with him.

And perhaps the biggest enigmas are these: That a man whom even his detractors agree is "brilliant" can at times be vindictive and petty. And that a man whom even his critics agree has an overwhelming compassion for "the little guy," can at times be so intolerant of, and rude to, individuals.

"How can he be both compassionate and rude?" asks the lawyer friend. "You're back to the fact that he's human . . . and 76." Ritter will turn 77 while this issue of *Utah Holiday* is on the newsstands. Only his very severest critics

feel that his intelligence has begun to show the effects of that age. (Ironically, the man he succeeded, Judge Tillman Johnson, didn't retire until age 91.)

Ritter is an intellectual as well as an intelligent man. He appears to have few hobbies other than reading—but his reading interests are wide: history, politics, philosophy, biography, current events. He has a passion for Thomas Jefferson. He loves to philosophize, is an entertaining conversationalist, enjoys a good laugh. He is a collector of art—a legacy of a favorite uncle, Utah artist Willis Adams—and has recently donated a total of 111 Navajo blankets and rugs to the U of U Museum of Fine Arts.

Many people consider him one of the brightest professors ever to have taught at the U law school. He may also have been one of the most arrogant and demanding (in a profession that has traditionally cultivated both), a man whose own capacity for detail and insight has made him intolerant of those who are less endowed. "He doesn't suffer fools gladly," notes one colleague.

When he became judge, after 25 years as a professor, he took this style with him.

"I've seen lawyers come out of his courtroom crying—and some who have literally thrown up," recalls one Salt Lake lawyer, who, like many other lawyers questioned, preferred to remain anonymous for fear of receiving courtroom reprisals from the judge.

He has been known to tell attorneys—and witnesses as well—to "shut up;" has told witnesses he doesn't believe them; has threatened lawyers with "one of those 15-cent meals" at the County jail. Most often these insults are conveyed in a loud voice.

Some lawyers argue that he only humiliates those lawyers who are unprepared or incompetent, or those he feels are trying to abuse the legal system. But others argue that the unpreparedness is sometimes a result of the short notice he allegedly gives, and that his sarcasm and his wrath fall also upon competent, prepared lawyers who happen to be out of favor with the judge, or are representing a client the judge doesn't like.

"I have very mixed emotions about him," admits one lawyer. "I have a deep respect and a feeling of warmth for him. But I despise the way he acts sometimes." Irascible and unpredictable are the adjectives that seem to pop up most, even among his admirers. Those who like him less also call him tyrannical and capricious.

All four traits may be due in part—or at least aggravated by—what is politely known as the judge's "drinking problem." It is reported he can be abusive when intoxicated, even to his friends. "It's like Dr. Jekyll and Mr. Hyde when he's been drinking," says a former drinking companion, although the judge has a reputation of holding his liquor well in some quarters.

Although he may be less than discreet about such matters, no one seems to question his propriety on the bench.

"I have no doubts that he is an honest judge," adds one lawyer. "But I sometimes wonder if he is intellectually dishonest"—that he sometimes lets his biases stand in the way of justice and/or legality.

His compassion for Indians, poor widows and young first offenders is legendary, and probably stems in part from his poorer days in and near the mines.

"Some of the more moving moments of my life have been sitting in his courtroom listening to him counsel a convicted young person," says one very prominent Salt Lake lawyer. Outside the courtroom he has been known to spend hours with a hospitalized prisoner giving grandfatherly advice on the evils of drugs.

"His colicky first grandson found relief on the ample slant of his grandfather's lap . . . Even panhandlers find him a soft touch."

He is described by one close friend as sentimental. And when his first grandson was a newborn, allergic to milk, the colicky baby often found relief by lying on the ample slant of his adoring grandfather's lap. Even panhandlers find him a soft touch.

Sentencing of prisoners—the most critical and lonely of a judge's duties—is performed by Judge Ritter with great compassion and concern, say lawyers who have clerked for him. Sometimes, in fact, his compassion leads him to later mitigate harsh sentences if he learns of extenuating family circumstances (a sick mother, many mouths to feed).

"The judge has a very open willingness to reconsider matters," notes one lawyer, who adds, however, that sometimes the compassion forgets what the evidence had originally dictated.

On the other hand, Ritter is reputedly a man who holds on tightly to a grudge. After his nomination to the federal bench was finally approved by Congress,

according to a once close friend, the Judge found out which lawyers had written letters opposing that nomination. It has been reported that those attorneys later suffered his wrath when appearing in his court.

Another of the Judge's grudges, apparently, is Gov. Calvin Rampton, who, as a lawyer, represented Ritter's wife in the couple's separation settlement in 1958.

His biggest grudge, however, is reserved for the press, which he feels has reported inaccurately and unfairly during his years on the bench. He has at least twice thrown reporters from his courtroom, for no apparent reason, and is reportedly the only judge in the country to ban sketching for television reports of the trials in his courtroom. His view of the press is apparent in his contention that this article for *Utah Holiday* was not "authorized."

And then there are the lawyers for whom he has no particular vendetta, but for whom he has no great love either. Perhaps it is because he considers them incompetent; perhaps it is the firm they are with, or the clients they represent. One is never sure.

Whatever the reasons, there are lawyers in this town who have to turn down potential clients whose cases are scheduled for Ritter's court, explaining: "In my current status with Judge Ritter, it would be unfair for me to take your case."

Conversely, says one of these lawyers, who once liked the judge, "knowledgeable clients will go to certain lawyers because they're more likely to win" (in front of Ritter)—or at least get kinder treatment and favorable rulings. Other lawyers strongly deny that Ritter judicially favors his favorite lawyers.

There are people who feel Ritter is the best jurist Utah has ever had, and there there are people who have been trying for years to impeach him.

His health is not as good as it once was, although since an operation last year, apparently to remove one kidney, he seems in better form.

As for resigning, his friends say he'll never do it—not until there is a Democrat president who will appoint a Democrat judge. And maybe not even then.

One Man's Justice

". . . his legal vendetta wells up from a reservoir of undisguised antipathy for judges' 'absolute immunity' and many Utah lawyers."

Julius Petrofsky isn't intimidated by the physical and judicial altitude of U.S. District Court Judge Willis W. Ritter. After all, most of Petrofsky's opponents (and allies as well) poke their heads at least a few inches higher into the atmosphere than he does. What Petrofsky may lack in height, he makes up in dogged determination.

Petrofsky "grew up" in Jersey City, New Jersey, where Mayor Hague's slogan was, "I am the law." "And he was the law as in many boss-ruled cities," Petrofsky' exclaims.

Petrofsky's mother topped out at just over four feet and he left home at 15 to join the Our Gang Comedy team in California where he was dwarfed by many of the adolescents. "My whole family is short, except my son who is 6'2" and traveling in Nepal right now. I just got a letter from him the other day asking for the $1000 I borrowed a while back. I don't have it."

He doesn't have the money, Petrofsky says, because he wedged his whole bankroll into legal proceedings, most of which have something to do with Judge Ritter.

Petrofsky's singleness of purpose in these matters led him to leave his Berkeley, California home and take an apartment in Salt Lake City for the duration of his legal struggles. "It takes only one person, but you have to be willing to stick your neck out as far as it will go," Petrofsky says.

Oft-times overbearing in his steadfast determination to see "justice prevail," Petrofsky continually emphasizes his motives are not based on a case of "his personal ox being gored," but an all consuming desire to "right some wrongs."

The intense explosive-dealer's legal vendetta wells up from a reservoir of undisguised antipathy for "Judge Ritter, many Utah lawyers and 'absolute immunity' for judges." Beyond his current litigation he sees certain judicial decisions as more evil and long-lasting than the most self-serving U.S. president or Congress at its worst. "Presidents and Congresses come and go, but when a corrupt judge gives a corrupt decision that's used as precedent, it keeps working its evil influence for hundreds of years," he emotes.

Frustration with his own litigations and legal research have probably made Petrofsky a little cynical: "Most people don't know that lawyers are officers of the court and are not under oath in court and therefore cannot be had for perjury. It is up to the judge if he chooses to apply contempt of court deceit of the court."

Petrofsky's leather satchel is nevertheless a supermarket of legal information. From it, he extracts manila envelopes, dozens of them, and he hastily divests them of copied depositions, docket sheets, pages from lawbooks, the U.S. Code, one after another in a procession marching in time with his volatile verbiage.

He has performed hundreds of hours of legal research over the past few years, presenting it to attorneys, hiring them, dismissing them, losing them, and serving as his own lawyer on at least one case.

How well he has performed his research and how well his attorneys assemble and present it will be known in the next several months when the outcomes of at least three legal suits are determined.

It all began about seven years ago when a California corporation of which Petrofsky is president sued a Utah corporation to which several million pounds of explosives had been sold. Petrofsky's firm and the Utah firm regularly bid against each other for the purchase of surplus government explosives

According to Petrofsky, Judge Ritter gave a summary judgment to the defendant based on Petrofsky's refusal to give information to the defendant "which could later have been used by them in their bidding against my firm."

The summary judgment by Ritter was reversed by the U.S. Appeals Court, 10th Circuit, according to Petrofsky. "It took me over a year to prevent the lawsuit from automatically going back to Judge Ritter's court until I found an attorney, (former Salt Lake City Commissioner) James L. Barker, who took legal action which resulted in getting the matter into Judge (Aldon) Anderson's court." There it currently waits further action. That's case No. 1.

It was after Judge Ritter's summary judgment in this case that Petrofsky began to "suspect a connection between Ritter, his decisions and attorneys practicing in his court who have also served Ritter as his private legal counsel."

Petrofsky says that while he was researching this hypothesis in the clerk of the court's (Ritter's) office, Judge Ritter issued an oral directive to his staff banning Petrofsky from the premises. Petrofsky countered with a suit aaginst Ritter, claiming that his ban from public records was illegal, violating his civil rights.

The case went before Judge Aldon Anderson who agreed with defense attorneys that judges have absolute immunity in judicial acts and therefore Judge Ritter was within his rights to exclude Petrofsky from Ritter's court area.

Petrofsky contends that Ritter's act of banning him from access to public records was an administrative act and not a judicial act. "Every case coming into a court could, by the judge in that court, be sealed in a judicial act," Petrofsky says, "but if it isn't sealed by the judge, it becomes public record."

"Those records I have been researching are not sealed, they are *public* records, and this is my concern," Petrofsky emphasizes.

"The U.S. Statute pertaining to public inspection of Court records is an administrative function. Title 28, U.S. Code, Section 753, pertains to administrative and not judicial acts," Petrofsky says.

Petrofsky appealed Judge Anderson's decision to the 10th Circuit Court of Appeals, which affirmed the defense's claim of "absolute immunity" based on the alleged judicial act.

Now Petrofsky's appeal is before the U.S. Supreme Court, pursued personally by him acting as his own attorney. He explains, "only a small percentage of cases presented to the Court are even considered and only about 10% of those go as far as oral argument. If mine goes that far, I will have to hire an attorney for that argument." That's case No. 2.

Despite his ban by Ritter from the records, Petrofsky has uncovered some facts in his research that lead him to believe that Judge Ritter favors attorneys from several Salt Lake City law firms. Painstakingly checking lawbooks and documents in courthouses and at the University of Utah, Petrofsky has uncovered Judge Ritter's private involvements in litigation and took note of the law firms representing Ritter in those cases. He then reviewed docket sheets from Ritter's U.S. District Court to see how lawyers from these same firms fared in Ritter's court.

His conclusion? "I believe there is a pattern of favoritism toward those representing Judge Ritter personally in other legal action," said Petrofsky. "The

lawyers connected to Judge Ritter during the period of 1970–74 were involved in 40-some cases before him (not including those involving the state or federal government) and they didn't lose one of them."

Petrofsky's secondary bone of contention in Ritter's outside legal involvements is the United States Code, Title 28, Section 455: "Any justice or judge of the United States shall disqualify himself in any case in which he . . . is connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

While the words "or his attorney" support Petrofsky's arguments, the phrase "in his (the judge's) opinion" seems to nullify them. Ritter can simply leave himself on the case. Petrofsky hopes the legal system will remove that decision-making power, deeming it unjust.

Petrofsky says that Title 28 U.S. Code, Section 144 states that it is procedure for the attorney of a litigant to file a motion based on the affidavit of his litigant concerning the prejudice of a judge against that attorney's client. "Judge Ritter and a number of attorneys did not reveal their connections in several cases in Ritter's court over the past few years and opposing attorneys and their parties therefore had no opportunity to file affidavits and motions concerning judicial prejudice," Petrofsky said. He therefore disclosed that he will file one or more lawsuits against them within the next few weeks. That's case No. 3.

Another of Petrofsky's research "discoveries" is an alleged conflict between what Judge Ritter reported in a government document and that which he said in a deposition involving some of his personal litigations.

Petrofsky says that Ritter testified in a case involving a Trust vs. a corporation that he (Ritter) had been one of the Trust's five original trustees, and that he had resigned in April, 1970.

A Public Report of Extra-Judicial Income filed by Ritter for the period January 1–June 30, 1970 shows that the judge wrote "none" under all sections of the report. Petrofsky points out that the trusteeship may not have necessarily involved income for Ritter, but Section V of the report entitled "Positions Held During Reporting Period" asks about *any* official positions.

It reads: "List all positions held by you in any organization, business or charitable, such as an officer, director or trustee, regardless of whether any compensation was received therefore."

Ritter wrote under the section, "none," and signed the report. Petrofsky says, "there's serious conflict there. Ritter leaves a gap of four months, from January to April, unaccounted for. His testimony and official report conflict."

Petrofsky's data on this matter now rests in the hands of U.S. 10th Circuit Court of Appeals Judge David Lewis. It was referred to Judge Lewis, according to Petrofsky, by the Judicial Council of the United States, made up of only the Chief Judges of each of the U.S. Courts of Appeals (about 12).

While these matters may rest in various stages of litigation and/or consideration, Julius Petrofsky does not rest. He continues his relentless pursuit for his justice.

ADMINISTRATIVE OFFICE OF THE
U.S. COURTS,
Washington, D.C., September 21, 1973.

Hon. CARL ALBERT,
Speaker, House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: On behalf of the Judicial Conference of the United States, I am transmitting herewith a draft of a bill, approved by the Conference, to amend the Act of August 6, 1958, 72 Stat. 497, relating to service as a chief judge of a United States district court.

The bill would repeal a section of that Act permitting a judge of a two-judge district court, serving at that time as the chief judge of such a court, to retain his position as chief judge after reaching age 70. All other chief judges of district courts, including judges in two-judge district courts who became chief judges after the passage of the 1958 Act, must reliquish their positions as chief judges at age 70.

The Judicial Conference believes that this exception, for chief judges of two-judge district courts, to the general rule of relinquishing chief judgeship positions at age 70 has outlived its usefulness and should be eliminated.

Accordingly, it is recommended that the draft bill be referred to the appropriate committee for early and favorable consideration. Representatives of the Judicial Conference and of this office will be glad to appear and testify at any hearing may be held, or furnish any additional information that may be requested.

Sincerely yours,

ROWLAND F. KIRKS,
Director.

Enclosure.

[H.R. 10615, 93d Cong., 1st sess.]

A BILL To amend the Act of August 6, 1958 (72 Stat. 497), relating to service as chief judge of a United States district court

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act of August 6, 1958 (72 Stat. 497), is amended by changing the first comma to a period and by striking all of the remainder of the sentence.

ADMINISTRATIVE OFFICE OF THE
U.S. COURTS,
Washington, D.C., May 7, 1976.

Hon. JAKE GARN,
U.S. Senate, Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR GARN: Thank you for your letter of May 3, 1976 advising me of the hearings on S. 1130 scheduled to be held on May 18. I would appreciate it if you will introduce into the public record my letter expressing the support of the Judicial Conference for this measure.

Inasmuch as Chief Judge David Lewis will be testifying in behalf of the Judicial Conference as well as in his capacity as Chief Judge of the Tenth Circuit, I am sure that much of the information relating to the proposed legislation will be submitted in Judge Lewis' testimony. Should you feel that this office can, however, be of any further assistance to you in this matter please feel free to call on me.

Sincerely yours,

ROWLAND F. KIRKS,
Director.

DEPARTMENT OF JUSTICE,
Washington, D.C., May 3, 1974.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 10615, a bill "To amend the Act of August 6, 1958 (72 Stat. 497), relating to service as chief judge of a United States district court."

Under existing law, 28 U.S.C. 136, the chief judge of a district court is the judge of the court who is senior in commission and under seventy years of age, unless no judge of the district court is under seventy years old.

The Act of August 6, 1958, which enacted the present version of this section, excepted from its coverage the chief judge of any district court having only two judges in regular active service so long as the chief judge sitting on the date of enactment continued to be a district judge. H.R. 10615 would delete from the Act of August 6, 1958, that exception.

H.R. 10616 was introduced on the recommendation of the Judicial Conference of the United States. The Department of Justice concurs in the recommendation of the Judicial Conference that this legislation be enacted.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

W. VINCENT RAKESTRAW,
Assistant Attorney General.

JONES DAY, REAVIS & POGUE,
Washington, D.C., July 10, 1975.

Re S. 1130

Hon. E. J. GARN,
Senate Office Building,
Washington, D.C.

DEAR SENATOR GARN: Your letter of June 25th, relating to this bill, came to my office while I was away on a short vacation. This is the first opportunity I have had to respond. I am sorry for the delay.

The situation with respect to the Chief Judge in the United States District Court in Utah is unique, and, I think, unfortunate. It is now nearly twenty years since Congress provided by law that no judge should serve as a Chief Judge after he reached the age of 70, with a few special exceptions. There is now only one judge in this special group, and the reason for any exception no longer exists.

Several years ago, while I held the office of Solicitor General of the United States, I was concerned about this situation. I got in touch with Congressman Emanuel Celler, the Chairman of the House Judiciary Committee, and with Congressman William M. McCulloch, then the ranking minority member of that committee. I spoke to them because I had been dealing with them on a matter involving an amendment of the Criminals Appeals Act. Both Congressmen Celler and McCulloch were interested in the repeal of the proviso in the Act of August 6, 1958. However, they reported to me that neither Senator from Utah would support such a statute, and that they felt that there was no prospect of proceeding successfully in such a matter without the support of at least one of the Senators from the area involved. Consequently, the matter was dropped.

I am very glad to learn that you are interested in this provision, and I hope that you will continue to support S. 1130. The basic policy of 28 U.S.C. 136—namely, that a judge shall cease to be Chief Judge upon reaching the age of 70—is sound, as has been shown by a great deal of experience in our judicial system. It is quite unwarranted, it seems to me, to have a special provision in our statutes which makes this policy inapplicable in a single case. The time has clearly come, in my opinion, when that exception should be repealed, and the same rule should be applicable in Utah as in all of the other States of the Union.

If I can be of any other assistance to you, please let me know.

With best wishes,

Very truly yours,

ERWIN N. GRISWOLD.

U.S. COURT OF APPEALS, TENTH CIRCUIT,
Salt Lake City, Utah, April 2, 1975.

Hon. E. J. (JAKE) GARN,
U.S. Senate, Washington, D.C.

DEAR SENATOR GARN: I have received your letter of March 19, 1975, requesting appropriate information concerning your anticipated testimony relating to S. 1130 and have instructed the clerk's office and circuit executive in Denver to promptly furnish the Administrative Office all information contained in that office that is pertinent to your inquiry. I understand you have made a similar request from the Administrative Office.

As you may know, I have publicly supported earlier versions of this Bill as a member of the Judicial Conference of the United States but such efforts have been to no avail. Former Solicitor General Griswold has on more than one occasion taken an active interest in the legislation and you might be interested in talking to him about the Bill and the difficulty in getting Senate attention focused on the problem.

As you note in your introductory remarks, the Bill has merit and should be enacted for the reasons you give and my support for it is not dependent on any personal opinion as to whether Judge Ritter is a good, bad, or indifferent judge.

The specific information you seek, as reflected from our official court records in Denver, will be included in the Administrative Office's response. However, I am enclosing two very recent opinions of our Court which reflect consideration of a high incidence of complaint that comes from lawyers arguing appeals before us. Of course complaints from losing litigants should be considered with caution and such complaints are made against judges other than Judge Ritter. However, dissatisfaction and claims of prejudice are very frequent in Utah appeals.

Sincerely,

DAVID T. LEWIS.

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES,
Salt Lake City, Utah, May 11, 1976.

Hon. JAKE GARN,
U.S. Senate, Washington, D.C.

DEAR SENATOR: I acknowledge receipt of your letter of May 5, 1976, renewing your suggestion that I submit a statement concerning the proposed repeal of the grandfather provision covering the chief judge of a two-judge court.

As I indicated over the telephone when I declined your previous invitation, I was not inclined to become embroiled again in the long-standing administrative difficulties in the District of Utah which finally led to my taking senior judge status in 1971 before ordinarily I would have considered it. Several of these problems were explored by the Judicial Council of the Tenth Circuit, the record of which, including some corrective orders, should be available to you and a continuum of which is treated in Utah Idaho Sugar Company v. Ritter, 461 F. 2d 1100 (10th Cir. 1972).

While the administrative problem has precluded my rendering any substantial judicial service to the District of Utah since I assumed senior judge status, I have been given more challenging and satisfying opportunities through my appointment by the Chief Justice shorty after my retirement as a member of the Temporary Emergency Court of Appeals of the United States on which I continue to serve, as a member of the Advisory Committee on the Rules of Procedure of the Judicial Conference of the United States, and in special assignments in various parts of the country. Thus, I have not been anxious to be propelled back into the local administrative situation and, indeed, since my retirement have endeavored to keep free of involvement in the hope that some independent means might be discovered to achieve harmony which I had been unable to discover. I attempted to express that attitude and hope in my retirement statement to the bar and to promote additional improvements that I had been unable to achieve in the copy of my statement to the bar at the time of my retirement. I am not in a position to speak firsthand concerning the situation since.

However, so that my position may not be interpreted as one of indifference toward the pending legislation, I have decided that I should make clear that I continue to support it and urge its passage, and this I am confident would be my position apart from any personal exposure to the problem.

I would prefer to have my position now emphasize rather than personal considerations, the overall policy commending the transfer of chief judge responsibilities at age 70 in all instances and that especially in two-judge courts is this desirable.

When the grandfather clause was originally approved by the Congress, there could have been an impression that in two-judge courts the general rule for chief judges to step down at the age of 70 was not as important as in larger courts. My experience and observation has demonstrated that the application of the general rule may be more important in two-judge courts than in larger courts where rules may be adopted by majority vote of the judges and inconsiderate decisions with respect to supporting personnel may be controlled by majority vote. In a two-judge court, if the judges cannot agree upon generally applicable local rules of court, no such rules can be adopted without intervention of the Judicial Council, and in the event of disagreement among the judges in a two-judge court concerning the employment or discharge of supporting personnel and with respect to various other decisions on which the majority of the judges in larger courts have final say, in a two-judge district court the chief judge has unrestricted power.

I believe that the statutes governing the designation, tenure and powers of chief judges could well be generally reviewed and perhaps amended as a long range project to bring them more in consonance with modern administrative conditions and problems of the federal courts. In the meantime, however, there seems no justification for continuing the statutory aberration which the proposed legislation is designed to correct.

Sincerely yours,

A. SHERMAN CHRISTENSEN,
Senior U.S. District Judge.

Enclosure.

STATE OF UTAH,
OFFICE OF THE GOVERNOR,
Salt Lake City, May 10, 1976.

Hon. E. J. (JAKE) GARN,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR GARN: It is my understanding that hearings are to be held in the immediate future on S. 1130 of which you are the principal sponsor. This bill would repeal the "grandfather clause" pertaining to Chief Judges in United States Judicial Districts.

I feel that the bill should be passed. If it were passed, in my opinion it would result in improved administration and supervision of the calendar in the United States District Court for the District of Utah. Whether the "grandfather clause" was ever justified from a standpoint of principle is questionable. Undoubtedly, it was adopted as a matter of expediency to facilitate the passage of the act. However, if it were ever justified now that there is only one Judge serving pursuant to the "grandfather clause", and he is a substantial number of years beyond the cut-off age, the continuation of the "grandfather principle" can no longer be justified.

I would appreciate it if you would place this letter in the hearing record on the bill.

Sincerely,

CALVIN L. RAMPTON,
Governor.

WHEREAS a resolution was adopted by the membership of the Utah State Bar in attendance at the Mid-Year Meeting January 11, 1974, calling for a secret poll of the Bar membership concerning the "Grandfather clause" whereby certain District Judges continue to serve as Chief Judges after age 70 and with the results of said poll to be made available to the United States Congress, and

WHEREAS said secret poll was conducted with 77.7% of those responding, constituting 50.8% of the active membership of the Utah State Bar, voting in favor of the repeal of the "Grandfather clause," and

WHEREAS this information was transmitted to the Congress of the United States, to the two Utah members of the House of Representatives and to each of the United States Senators from Utah, and

WHEREAS a resolution was submitted to the Board of Commissioners of the Utah State Bar for consideration of the membership of the Utah State Bar at its Mid-Year Meeting January 10, 1976, urging passage of S1130, action similar to that previously acted upon by the membership of the Utah State Bar, the Board of Commissioners of the Utah State Bar made no recommendation with respect thereto, the bar membership having previously acted thereon, but submitted the same to the Bar membership in attendance, and

WHEREAS the resolution was presented on the floor for consideration of the membership, and carried by a vote of 106 for to 62 against,

NOW THEREFORE the official action of those members of the Utah State Bar assembled at the January 10, 1976, Mid-Year Meeting of the Utah State Bar is affirmed to be in favor of S1130.

HAROLD G. CHRISTENSEN,
President, Utah State Bar.

Attest:

DEAN W. SHEFFIELD, *Executive Director.*

UTAH STATE BAR,
OFFICE OF THE PRESIDENT,
Ogden, Utah.

To the Congress of the United States of America:

WHEREAS, a resolution was duly adopted by the membership of the Utah State Bar in attendance at the Mid-Winter 1974 Meeting of the Utah State Bar, January 11, 1974, that a secret poll be taken of the entire active membership of the Utah State Bar, concerning the "grandfather" clause of Section 3, Public Law 85-593, whereby certain District Judges continue to serve as Chief Judge of their Districts after age 70, to determine whether the membership of the Utah State Bar favored the repeal of the "grandfather" clause, and

WHEREAS, such a secret poll was undertaken, which resulted in 77.7% of those responding voting in favor of repeal and 22.3% voting against repeal, and

WHEREAS, the 77.7% voting for repeal constitutes 50.8% of the active membership of the Utah State Bar,

NOW, THEREFORE, this resolution is to memorialize Congress, in accordance with said resolution and poll, to repeal the "grandfather" clause of Section 3, Public Law 85-593, to eliminate the exception under which certain U.S. District Judges continue to serve as Chief Judges of their respective Districts after age 70.

By direction of the Board of Commissioners:

LA VAR E. STARK,
President, Utah State Bar.

Attest:

DEAN W. SHEFFIELD, *Executive Secretary, Utah State Bar.*

U.S. DEPARTMENT OF JUSTICE,
U.S. ATTORNEY,
DISTRICT OF COLORADO,
Denver, Colo., May 11, 1976.

Hon. JAKE GARN,
U.S. Senate,
Washington, D.C.

DEAR SENATOR GARN: I personally support S. 1130. My background is that I have engaged in a heavy trial practice in federal court for nearly 25 years, seven of those years as United States Attorney for the District of Colorado.

I see no valid basis for distinguishing between large and small districts in providing for the tenure of chief judges. History has shown, in fact, that a tragic mistake occurred when the exception was made.

I thank you for permitting me to comment.

Sincerely yours,

JAMES L. TREECE,
U.S. Attorney.

U.S. DEPARTMENT OF JUSTICE,
U.S. ATTORNEY,
DISTRICT OF IDAHO,
Boise, Idaho, May 12, 1976.

Hon. JAKE GARN,
U.S. Senate,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR GARN: I was happy to receive your letter dated May 6, 1976 with regard to Senate Bill 1130.

This bill has been needed for the last twenty years and the failure of the Congress to enact the bill has resulted in great difficulties in a few districts.

Unfortunately, age sometimes accentuates the tendency to become arbitrary dictatorial, and also causes a lessening of the abilities of a judge.

The condition in the State of Utah has been a scandal among the Bar in Utah and Idaho and the Western States for many years.

There is no sound reason for the "grandfather clause" pertaining to two-judge districts. The problems are the same with aged judges whether it be a small district or a large district.

I most certainly urge the passage of Senate Bill 1130 and the prompt repeal of the so-called "grandfather clause."

Very truly yours,

MARION J. CALLISTER,
U.S. Attorney.

TIBBALS AND STATEN,
LAW OFFICES,
Salt Lake City, Utah, May 11, 1976.

Re Senate Bill 1130.

Senator E. J. GARN,
U.S. Senate,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR GARN: Please accept my sincere thanks for your courtesy in keeping me advised as to the progress of this Bill above referenced. I hope it

may not be presumptious of me to reiterate at this time, my feeling that this amendment is essential in the interest of sound legislation. Experience seems to teach that the creation of exceptions to the enforcement or effectiveness of legislation such as the exception created in the original enactment 72 Stat. 497 inevitably lead to inequities, injustice and in many cases outright hardship. If legislation is proper, it should apply equally to all.

In this case, the people of the State of Utah have been greatly imposed upon by the execption which permitted Chief Judge Ritter in our United States District Court to retain that position far past the mandatory retirement age prescribed for others. The mere fact that he was, at the time of the original enactment, an incumbent and would be effected by the law seems hardly an excuse for making an exception. I urge the enactment of Senate Bill 1130.

I am sure from your long tenure in public office in this City, you are aware of the many problems that the people of this State have been confronted with by virtue of the judicial intemperance of the Chief Judge. Perhaps it might not be amiss to bring to your attention the statements made by the Chief Judge as quoted in this mornings Salt Lake Tribune on the issue of a Grand Jury. As you are probably aware, he preempterly dismissed a Grand Jury which was in the middle of deliberations and consideration of matters which apparently, though the secrecy has not been violated to my knowledge, of violations by certain persons and the Judge refused to permit the Grand Jury to continue its deliberations. He has been forced to call a new Grand Jury by action of the United States District Attorney who requested the Tenth Circuit Court of Arpeals to compel Ritter to call a Grand Jury. Before the matter was heard in the Tenth Circuit, Judge Ritter complied and called for a Grand Jury. I submit to you, the statements as quoted in the Tribune. I personally, have in years gone by, heard Judge Ritter hold forth on exactly the opposite side of this question, extolling the Grand Jury as one of the great democratic institutions which protected the citizens against the intemperance of the Courts, the Magistrates and the Prosecutor.

Would it be too much to assume that perhaps Judge Ritter's present dislike of the system stems from his inability to control the system in a few years past when in his desire to get at the Salt Lake County Sheriff, he irregularly impaneled a Grand Jury, succeeded in getting this Grand Jury to pose indictments in an area in which the Grand Jury had no legitimate right of inquiry and was infuriated when the Department of Justice refused to permit the United States Attorney to sign the indictments thereby rendering them ineffectual. Nonetheless, despite this knowledge of the fact that the indictments were not lawful, Judge Ritter released them to the press. The damage to Sheriff Larson's reputation in the community cannot be assessed. It was an act which will long stand out in the opinion of many of the citizens of this state as an example of abuse of Judicial power.

It is time that Judge Ritter was relieved, not only of his duties as Chief Judge, but of his duties as Judge. It is unfortunate the legislation under consideration cannot accomplish the second objective as well. Certainly the continuance in the office of Chief Judge is a disservice to the people of this State. Your Bill is well founded and should be enacted.

With all good wishes, I remain,
Very truly yours,

ALLEN H. TIBBALS.

THE ATTORNEY GENERAL,
STATE OF UTAH,
Salt Lake City, Utah, May 11, 1976.

Re S. 1130

Hon. E. J. "JAKE" GARN,
U.S. Senate,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR GARN: As the former City Attorney of Salt Lake City (1968–1974) and as a private practitioner since 1953, I have practiced law before the United States District Court for the District of Utah and am familiar with the provisions of the Act of August 6, 1958 (72 Stat. 497) under which Willis W. Ritter is the only remaining Chief Judge of a United States District Court who is over seventy years of age.

In view of the strong public policy expressed in the Act of August 6, 1958, relating to the maximum permissible age for chief judges of federal district courts, and my own experience before the United States District Court for the District of Utah, it is my opinion and recommendation to the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee that the interests of justice will be served by the enactment of the subject bill which has my unqualified support.

Respectfully yours,

JACK L. CRELLIN,
Assistant Attorney General.

CANNON AND DUFFIN,
ATTORNEYS AT LAW,
Salt Lake City, Utah, May 10, 1976.

Re Amendment to section 3 of the Acts of August 6, 1958, (72 Stat. 497) Hearing set for May 18, 1976.

SENATE JUDICIARY COMMITTEE,
U.S. Senate,
Washington, D.C.

GENTLEMEN: My interest is in having the Committee act favorably on the proposed amendment to the subject act.

It may be that my feelings might be dismissed as being biased and prejudiced. At the hearing in Salt Lake City prior to the appointment of Judge Willis W. Ritter, I appeared and testified that he did not have a judicious temperment and therefore I was opposed to his appointment. Time has not change my opinion. Noting those testifying in his behalf, one finds those who appear before him on behalf of clients. Prudence would so dictate. Once I appeared before his court after his appointment. I will never appear again. I feel clients of mine would not be given judicious consideration. It is almost thirty years since he was appointed. I have been in the federal court but once. That is a sad commentary on our system. Not only have I felt limited, but my associates have felt it is a disadvantage to be associated with me in our practice.

The law itself is unfair as it makes an exception. Everyone should play under the same rules and especially in federal courts.

It is respectfully urged that the committee recommend passage of the proposed amendment to have the law apply to all equally.

Respectfully yours,

T. QUENTIN CANNON.

MEREDITH, BARBER & DAY,
ATTORNEYS AT LAW,
Salt Lake City, Utah, May 7, 1976.

Re The Honorable Willis W. Ritter, Chief Judge, United States District Court for the District of Utah.

Hon. JAKE GARN,
Senate Office Building,
Washington, D.C.

DEAR SENATOR GARN: I have been informed that the Senate Judiciary Committee is contemplating hearings related to the repeal of the Grandfather Clause under which the Honorable Willis W. Ritter retains his position as Chief Judge of our District.

Though I am philosophically opposed to congressional tampering with the bench, I am in full agreement that the Grandfather Clause should be repealed solely because it will effect the status of the Honorable Willis W. Ritter and the quality of justice which is dispensed by the United States District Court in Utah.

I have had significant experience before the Honorable Willis Ritter and have many times witnessed the arrogant, tyrannical, arbitrary, and insulting manner in which Judge Ritter conducts his court and treats the individuals who appeared therein. Of particular concern to me is the manner in which the calendars of trials and events are conducted in that court and the fact that Judge Ritter does not conduct either trials or rule days on a regular basis, but seems to hold the entire legal community of the District of Utah at his beck and call and exercises his apparent prerogative to demand immediate appearance

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with no consideration for the scheduling difficulties and the other business of the participants in proceedings before him.

The last occasion upon which I had the pleasure of appearing before Judge Ritter was in a trial of *United States* v. *Karl J. Bray*, No. 75-1452 in the United States District Court for the District of Utah, in Information under which Mr. Bray, a tax protester, was tried on two counts of violations of the Internal Revenue Code. The case is presently on appeal with one assignment of error relating to the refusal of the Honorable Chief Judge to recuse himself from trial of the case. I have taken the liberty of enclosing herewith a copy of the brief in that case which contains significant verbatim quotes from the record which I hope will be useful to you in demonstrating the egregious manner in which Judge Ritter conducted this trial. The areas which I have indicated by red markings, though I cannot state that they are typical, are not so atypical as to fail to give me great concern for the overall judgment and competence of this man and his overall ability to properly conduct the judicial business of the District courts in our State. The records of a significant number of other cases will reflect the same kind of comments and actions from the bench, and I feel they would be most interesting to the members of your committee.

I would be happy to respond to any questions you may have related to my experiences in Judge Ritter's court or, in particular, his conduct of this case, and would welcome any opportunity to discuss these matters with you either personally or by further correspondence.

Yours very truly,

JAMES N. BARBER,
Attorney at Law.

CALVIN A. BEHLE,
Ogden, Utah, May 18, 1976.

Re: S. 1130

Hon. JAKE GARN,
Dirksen Senate Building,
Washington, D.C.

DEAR SENATOR GARN: Through your legislative assistant Lincoln Oliphant you have asked me to confirm any public statements that I have made pertaining to the incumbent Chief Judge of the Federal District Court of Utah, in connection with the hearing on S. 1130. I have strongly supported this Bill designed to remove the discrimination against the State of Utah by way of having its citizens alone suffer as our Federal judicial affairs continue to be presided over administratively by an incumbent who is now well over the age of 75.

At the outset may I state that I have known this Judge, and generally favorably, since I was one of his students at the University of Utah Law School more than 45 years ago. No one can fault him for not having a brilliant mind. However, a lack of judicial temperament (which on candid occasion he freely admits) has made the trial of cases in his court on too frequent occasion most difficult for counsel, clients, court personnel and indeed all attending or participating. Ample support for this will come from the News Media, Members of the Bar, court personnel who are in a position to talk, his judicial associates and from official records on appeal. But personally I do not know of anything in his conduct which would justify impeachment.

It has been primarily and upon much too consistent occasion that his lack of judicial temperament is displayed in his administrative capacity as Chief Judge. These instances too may be collected from sources suggested. The situation seems to have become aggravated to an almost impossible point now that his normal retirement age from that position was achieved, and it was discovered that he could apparently go on until death because of the legislative provision commonly designated "The Grandfather Clause."

In 1972 as State Delegate elected by Utah lawyers and then also the member from the Intermountain Area on the American Bar Association Board of Governors I was approached from several sources as to why the Bar could or would not do something to call the attention of Congress to the discrimination against Utah. Many instances were cited—some known to me personally—where the incumbent Chief Judge had seemed to be most arbitrary in his administrative actions. One item only of particular concern to Bench and Bar alike was his refusal to establish court rules pertaining to such matters as the assignment to

cases between the Federal Judges of Utah—requiring special action by the United States Court of Appeals for the Tenth Circuit.

In seeking an answer to this question above I was advised by the Chairman of the American Bar Association Committee on the Federal Judiciary and also by the Office of the Chairman of the Judiciary Committee of the Senate (1) that the reason why the incumbent continued as Chief Judge beyond the age of 65 was the courtesy provision of The Grandfather Clause; and (2) that until the Bar of Utah took exception there seemed no reason why this courtesy should not continue to be extended for a long as the last Federal Judge in the whole United States incumbent at the time the mandatory 65 retirement rule from administrative position was enacted, remained in office.

Accordingly at the June, 1973 meeting of the Utah State Bar at Provo, Utah a written resolution was submitted by me for action whereby the Utah State Bar respectfully was to request Congress to repeal the clause which was resulting in the discrimination against Utah and its citizens. The incumbent was an outstanding example of just why the mandatory age had been passed. The resolution also would require the Board of Commissioners of the Utah State Bar to so advise Congress and the Congressional delegation from Utah, of the official position of Utah's Bar. This motion was duly presented at the time set by the President of the Utah State Bar; was fairly and fully debated; and by standing vote was adopted by more than two-thirds of the members present. Thereafter (the number present was far short of the entire membership—the Utah State Bar is integrated for *all* lawyers) a written ballot was submitted. More than a majority of the *entire membership* returned their ballots in favor of requesting Congress to repeal the discriminatory Grandfather Clause exception. The Bar so notified the Utah members of Congress. This position was maintained after debate as recently as this year.

Here we have a balancing of whether the continued courtesy extended the particular incumbent of the office of Chief Judge of the Federal District Court of Utah is justified in the cause of justice, as against removal for the public good of the exception existing now for him.

In my opinion as stated above there is no justification for the continuance in the administrative office of one who has so flagrantly and frequently performed in the very manner which led to legislation for mandatory retirement at age 65. Otherwise this situation which reflects upon the Federal Judiciary, the Bar, and indeed the entire administration of Justice in the eyes of the citizens of Utah will no doubt continue indefinitely until death eventually will strike. We would not wish such a solution.

Sincerely,

CALVIN A. BEHLE.

STATEMENT OF HON. JAKE GARN, U.S. SENATOR FROM UTAH

Senator GARN. Let me begin, Mr. Chairman, by expressing my personal gratitude to you for scheduling this hearing. The assistance of the distinguished Ranking Minority Member is also greatly appreciated. This hearing has been sought for years by leading members of the judicial branch, the bar, and concerned citizens, and on behalf of these interested parties, I express my sincere thanks.

S. 1130 will repeal the exemption to 28 U.S.C. 136 which now allows the Chief Judge of only one U.S. District Court to maintain his chief judgeship after age 70. Other witnesses will provide information of a specific nature concerning the judge's court administration and I will supplement that information, leaving details to the experts.

I will provide the committee with background information, policy considerations, and the sentiment of Utahans who resent and regret the way the U.S. District Court for the District of Utah is being managed.

The first section of my testimony is a judicial history of the grandfather clause and I will skip that over to the middle of page 5. Mr. Chairman, I would say that I am sympathetic with your senti-

ments expressed to me in a recent letter: ". . . I believe that it is bad policy for the Congress to renege on a grandfather provision which is adopted in order to allay opposition to a bill"—letter from Quentin N. Burdick to Jake Garn, December 1, 1975. And I certainly think there is wisdom in your desire to keep commitments.

The above statement, however, is a general statement, a statement that must permit exceptions. And just as in 1958 when circumstances persuaded Congress to permit an exception to the general rule that chief judges relinquish that role at age 7., so today the facts compel us to adopt another exception and repeal this "grandfather clause." This exception need not be based on political reality as the 1958 exemption was, but can stand on merits of fact, reason, and justice.

I have stated that "grandfather clauses" are sometimes necessary and acceptable. I have also agreed with the distinguished chairman that they ought not to be reneged except under unusual circumstances, but I am resolved to see this particular clause revoked because this situation contains more than enough facts to classify it as "unusual."

The following facts and policies have convinced me that S. 1130 should pass and that this committee ought to repeal any grandfather clause when the weight of evidence becomes as burdensome as it does in this case.

S. 1130 ought to pass because the same organizations that supported the original act and its amendments now support repeal of the clause of exception. Who were those organizations that supported H.R. 985 in 1957 and 1958? The Judicial Conference, the American Bar Association, the Department of Justice: The most objective, deliberative, and influential entities of the American judicial system. What organizations now support S. 1130? The Judicial Conference, which says, "The Judicial Conference believes that this exception . . . has outlived its usefulness and should be eliminated"—letter from Rowland F. Kirks, director, administrative office of the United States Courts to Carl Albert, Speaker of the House of Representatives, September 21, 1973—it's added to this statement—and also a letter of confirmation from Rowland F. Kirks to Jake Garn on May 7, 1976, reaffirming this position of the Judicial Conference.

The Department of Justice, which says: "The Department of Justice concurs in the recommendation of the Judicial Conference that this legislation be enacted"—letter from W. Vincent Rakestraw, Assistant Attorney General to Peter W. Rodino.

Although the House of Delegates of the American Bar Association has taken no specific stand on repeal of the clause, it is believed that its position has not changed from 1957 when it supported a bill identical to H.R. 985, as introduced, with a relinquishment date at age 70 years and without a "grandfather clause." The committee on the Federal Judiciary said, "Your committee is of the view that this legislation is desirable and should be enacted. Accordingly, it recommends that the House of Delegates adopt the resolution endorsing (the identical bill)."

The House of Delegates adopted the language. S. 1130 ought to pass because the above-cited eminent authorities are joined by other leaders of the bar and bench in calling for its passage.

Chief Judge David T. Lewis of the U.S. Court of Appeals for the 10th Circuit says:

> . . . I have publicly supported earlier versions of this bill as a member of the Judicial Conference . . . but such efforts have been to no avail. * * * [T]he bill has merit and should be enacted . . . and my support for it is not dependent on any personal opinion as to whether Judge Ritter is good, bad, or an indifferent judge.

Governor Calvin L. Rampton—whom I'm sure you know, Mr. Chairman—elected three times as Governor of Utah and probably the most popular governor in the history of the State of Utah, said:

> I feel [S. 1130] should be passed. If it were passed, in my opinion it would result in improved administration and supervision of the calendar in the U.S. District Court for the District of Utah. Whether the "grandfather" clause was ever justified from a standpoint of principle is questionable. Undoubtedly, it was adopted as a matter of expediency to facilitate the passage of the act. However, if it were ever justified now that there is only one judge serving pursuant to the "grandfather clause" and he is a substantial number of years beyond the cut-off age, the continuation of the "grandfather principle" can no longer be justified.

This was a letter from Governor Rampton to me on May 10, 1976.

Erwin N. Griswold, former Solicitor General of the United States, says:

> The situation with respect to the Chief Judge in the U.S. District Court in Utah is unique, and I think, unfortunate.
>
> The basic policy—namely, that a judge shall cease to be a Chief Judge upon reaching the age of 70—is sound, as has been shown by a great deal of experience in our judicial system. It is quite unwarranted, it seems to me, to have a special provision in our statutes which makes this policy inapplicable in a single case. The time has clearly come, in my opinion, when that exception should be repealed, and the same rule should be applicable in Utah as in all of the other States of the Union.

The Utah State Bar has gone on record twice favoring repeal of this "grandfather clause." On January 11, 1974, a resolution was passed at the midwinter meeting of the bar authorizing a secret poll of the bar membership concerning this issue—77.7 percent of those responding favored repeal.

Similarly, at the midwinter meeting in January 1976, the Utah State Bar passed a resolution by a vote of 106 to 62 stating ". . . the official action of those members of the Utah State Bar assembled . . . is affirmed to be in favor of S. 1130."

S. 1130 ought to be passed because its passage would not frustrate congressional policy intent as established in 1957 and 1958. We must remember that H.R. 985 passed both the House and the Senate without the "grandfather clause" and was apparently acceptable to both bodies for over a year until the bill was reconsidered and amended for political reasons.

It is true that the bill as passed by both Houses (before reconsideration) contained a relinquishment age of 75 years, but the sitting chief judge in the Federal District Court for Utah is 77 years old, having been born January 24, 1899, and would have had to relinquish his chief judgeship nearly 2½ years ago even if the more liberal version of the bill had been signed without the "grandfather clause."

Unfortunately, that version passed both Houses without being signed. I caution us against assuming that S. 1130 will frustrate the intention of the 85th Congress. It will not, as the record shows.

S. 1130 should pass because the policy forecasts given by Senator Eastland in 1958 for adoption of the "grandfather clause" have

proven to be just the opposite of what he reasonably expected them to be at that time. Proposing adoption of the "grandfather" amendment, Senator Eastland said: "* * * [I]n a district having only two judges, the administrative duties are not such a heavy burden upon the chief judge and do not require him to spend a substantial part of his time in pursuing duties other than judicial. For this reason, it is deemed desirable not to change the present relationship of the judges in districts where there are only two judges in active service."

The fact is, Mr. Chairman, that this expectation has not come to pass and that the experience of two-judge district courts has been sufficient to show that any amendment to the 1958 bill should have specifically included two-judge courts, not specifically exempted them.

This conclusion is reached on the basis of the experience of many, including the man who has perhaps been most affected, A. Sherman Christensen, senior U.S. district judge, who formerly was in active service with Judge Ritter in the U.S. district court for Utah.

Judge Christensen explains the dilemma of the two-judge court as follows. I will skip over that and have it included in the record.

Perhaps the most important reason that S. 1130 ought to pass is the failure of Judge Ritter to maintain acceptable standards of judicial conduct. Surely any judge who continues to serve as a chief judge under the provisions of a "grandfather clause" that now applies solely to him ought to be required to maintain at least acceptable standards of judicial conduct, pertaining both to his duties as chief judge and his regular duties as a Federal district court officer.

This is a minimum standard of conduct, I believe. The ideal would be an expectation that any judge so protected and exempted would maintain exemplary standards of conduct. Congress can reasonably expect that when it carves out a special exemption in the law for a certain class of persons that those persons act in a manner consistent with their special legal status.

If "exemplary" conduct is too high a standard, then it is reasonable to require at least "acceptable" behavior. Further, the standards of conduct can be applied to the judge's total behavior, not just his behavior in the area in which he operates under the statutory exemption.

That is, when Congress creates an exemption for certain chief judges, it ought to maintain that exemption only so long as the exempted judges maintain standards of "acceptable" behavior, both in their capacity as chief judges and in their capacity as active Federal judges.

I believe the standard of conduct as to the chief judgeship is self-evident: if a judge is not adequately performing his duties as chief judge he renders himself unfit to serve under a special statutory exemption.

This rule is based on fair play; political exemptions may be necessary, but they need not be maintained in spite of persistent abuse. My belief that even non-chief judgeship duties are relevant in determining whether a statutory exemption which relates solely to the chief judgeship ought to continue is based on the belief that Congress has an affirmative duty to end privileges and perquisites specially extended when abuse occurs in an area so intertwined with the chief judgeship that performance in one area cannot be separated from performance in the other.

What kind of reasoning is it which argues that a special one-man exemption should be continued after it has been shown that the only

man still serving under the exemption abuses both his administrative and regular judicial duties? Must we continue to reward intemperate and injudicious behavior with a special exemption? I earnestly hope we do not.

I have many examples, Mr. Chairman, of this intemperate and injudicious action as a chief judge and also as a sitting Federal judge. I will not take the time of the committee to read them. I will skip over them and have them included in the record.

Finally, S. 1130 ought to pass because the facade of detached impartiality and judicial sufficiency has crumbled from Willis W. Ritter. Utahans no longer understand—if, indeed, they ever did—why this man continues to receive special and unique protection from the simple rules that apply to everyone else. We yearn for an equal treatment, and it ought to start with judicial fairness.

Again, I have a parade of items that fill my files from letters from various people to examples of mistreatment in his court to editorials. On January 18, 1976, the Ogden, Utah Standard-Examiner editorialized, "Time Has Come for Federal Judge Willis W. Ritter to Step Down." Again, I will skip over all of these examples and not take the time of the chairman to read them.

Even books have been written about Judge Ritter. I will just read one quote from Joseph C. Goulden, author of a recent book on Federal judges. He said, after discussing Judge Ritter for several pages, "At one point I had decided that Judge Willis Ritter, the perpetual-fury machine of Salt Lake City, deserved the honor [of ultimate expletive deleted judge of the Federal courts]. Ritter's bad temper, however, seems to be fired by age and whiskey more than by innate meanness and, as is true of any ricocheting object, he occasionally lands on the right side of an issue."

These kinds of points are made over, and over, and over again in letters and in newspapers and now in books. It's time we no longer reward such behavior with special "grandfather" protection. This is the very least that can be expected of a Government of laws.

Mr. Chairman, what more can be said? Who else needs to speak? What further actions need to be taken? How much more time needs to pass? A quote from the attorney general of the State of Idaho: "The condition in the State of Utah has been a scandal among the Bar in Utah and Idaho and the Western States for many years." Let's take the time now to correct it.

Thank you, Mr. Chairman.

Senator BURDICK. Thank you, Senator.

Our next witness is the Honorable Ramon M. Child, U.S. district attorney of Salt Lake City, Utah.

Mr. CHILD. Good morning, Chairman Burdick. I have with me from the Department of Justice certain persons who would like to make some comments. I have Mr. James Dewey O'Brien of the Tax Division, where he is the Acting Deputy Assistant Attorney General. He would like to present a statement, a written statement for the record.

He has with him Willard C. McBride, who is the Assistant Chief of the Criminal Section of the Tax Division, in case the committee has any questions to ask on specifics. I also have with me Mr. Rudolph W. Giuliani, who is the Associate Deputy Attorney General and he was Executive Assistant U.S. Attorney in the southern district of New York and has a great deal of experience in these matters.

He would like to say a brief comment before I start and then I have a statement.

Senator BURDICK. Have you got the names?

The REPORTER. No—Giuliani?

Senator BURDICK. We want the names for the Reporter at the conclusion of the hearing, if you can give them then.

The REPORTER. I'll ask them afterward.

Senator BURDICK. Fine. Gentlemen, I hope you'll be brief as possible because we have a Joint Session today at 12:30, but proceed in any way you wish.

Mr. GIULIANI. My name is Rudolph W. Giuliani, G-i-u-l-i-a-n-i. I am Associate Deputy Attorney General. Mr. Chairman, we will be very brief. And I'd just like to say a few things to place in context before Mr. Child's testimony.

We're here from the Department of Justice to testify in support of S. 1130 to repeal the "grandfather clause" of Public Law 85-593. The rationale of that law is simply that, as a general rule, the Congress has determined that it is inconsistent with the public interest for a judge to do double duty past the age of 70—that is, to do duty as both a district judge handling a civil and criminal caseload and also to preside as an administrative judge over Federal litigation.

In the 18 years since that statute was first passed, both facets of a chief judge's duty—namely, presiding over Federal trials and also administering a court—have become much more complicated, due, No. 1, just to the sheer increase in the number of cases, both civil and criminal, that have been filed in the U.S. courts, and even more importantly, because of the complexity of those cases.

Criminal law has changed significantly over that 18-year period and has become significantly more complex. The civil cases that are brought have also become more complex, so that the original rationale for that general rule is now underscored and emphasized by the sheer increase in numbers and, more importantly, by the increase in complexity of the kinds of cases that a Federal judge must preside over and the kind of court he has to administer.

Mr. Child's testimony will present a practical example of the wisdom of this general rule enacted by Congress 18 years ago. There's no doubt that in application a general rule like this, saying that a judge cannot serve in both capacities past the age of 70, may, in certain circumstances, deprive the Government of the effective service of a man who, past the age of 70, who can, in fact, effectively do both jobs.

The Department of Justice submits that the examples that will be given by Mr. Child, however, show us the other side of the picture and show us the wisdom of this general rule, that in Judge Ritter's case, he has demonstrated, certainly since the passage of that statute and certainly since the time he passed the age of 70, that he cannot perform both roles; namely, sit as a trial judge in complicated and important Federal cases, both civil and criminal, and also administer a court calendar.

So that now I will turn over to Mr. Child for him to present to you examples of why Judge Ritter cannot perform both roles and why this Congress should repeal the "grandfather clause" now that it only affects Judge Ritter. Mr. Child.

STATEMENT OF RAMON M. CHILD, U.S. DISTRICT ATTORNEY, SALT LAKE CITY, UTAH

Mr. CHILD. If it please this Committee and Honorable Chairman, my statement is largely directed to criminal matters and is divided into four areas: one, the manner in which Judge Ritter processes cases through his court. In the central division of the United States Court for the District of Utah there are no published rules of court.

Judge Ritter uses the "trailing calendar" system with very little advance notice to counsel of that calendar. During the last few years, the number of trial calendars set up by the chief judge each year has declined. And consequently, each trial calendar has contained a large number of cases for trial.

On Friday, December 12, 1975, late in the afternoon, my office received notice of a criminal trial calendar to commence at 10 o'clock a.m. on Thursday, December 18th, 6 days before Christmas. On that calendar, 23 cases had been set for trial. Three of the first four cases were tax cases involving approximately 100 witnesses, many of whom resided out of the State of Utah.

During this period of time in December, 1975, United Airlines was on strike. Christmas holiday traffic aggravated the situation. Consequently, on Monday, December 15th, I filed a motion with the court requesting that we be given 21 days to prepare for that trial calendar and informing the court of the tremendous difficulty we were having in preparing and serving subpenaes and securing witnesses on such short notice. Nevetheless, on Thursday, December 18th, Judge Ritter held a call of that trial calendar.

Four cases were dismissed outright because the Government did not have its witnesses present. All four of those cases are now on appeal. In one of those cases, the court was informed by Government counsel that the case could be ready by the time it was reached on the following Monday. Notwithstanding the fact that this case was No. 20 on the calendar, the court stated, "The case is reached now," and then dismissed it.

Judge Ritter required the Government to try four other criminal cases on that calendar on the following day, Friday, December 19. Sensing the mood of the court, defense counsel waived jury and all four cases tried on the 19th were lost by the Government. Because jeopardy attached in three of those cases, only one is on appeal.

Senator BURDICK. May I ask a question at this point? I don't want to interrupt your train of thought, but I think it's important. Was he acting as a chief judge then or just as a trial judge?

Mr. CHILD. He was acting as the trial judge at that point. The other cases on the trial calendar at that time the court reluctantly set over to January 5. There are numerous other examples. In May of 1974, 19 cases were set on a trial calendar with only 7 days notice. In November of 1974, 31 cases were set on a trailing calendar with only 3 days notice. In October of 1975, 30 cases were set on a trailing calendar with zero days notice to my office. In November of 1975, 23 cases were set on a trailing calendar with 6 days notice. And in January of 1976, 14 cases were set with 2 days notice.

Often when the cases are not ready because of the inability of the Government to secure attendance of witnesses within the time notice,

the cases are dismissed. Judge Ritter does not hold rule days—that is, days upon which arraignments will be taken or motions heard in cases on a regular or even a frequent basis.

The last criminal rule day in the district of Utah was January 16 of this year. There are presently 32 cases involving 46 defendants awaiting arraignment in the central division. Of these defendants, 23 have either been arrested or served with summons and bound over for arraignment after preliminary hearing before the magistrate. However, none of these 23 defendants has yet been formally charged in an information or indictment.

No indictment has been possible during this period because of the chief judge's refusal to convene a grand jury. No information could be filed or pleas taken during this period because of the chief judge's failure to schedule court time for the conducting of such business.

Furthermore, at present 23 defendants have been formally charged by indictment or information and await arraignment in the central division.

In 21 of these 23 instances, the chief judge has failed to meet the specific 30-day time requirement of section 2(a) of the interim plan for achieving prompt disposition of criminal cases in the district of Utah, which plan he and the associate judge adopted pursuant to the requirements of rule 50(b), Federal rules of criminal procedure.

The judge's usual practice is to defer hearing motions to dismiss or suppress until the time of trial. That means he defers a ruling on a motion until after a jury has been picked and sworn, thereby causing jeopardy to attach and thus depriving the government of its right to appeal an adverse ruling.

The chief judge made a statement in a recent case wherein he admitted that his purpose in delaying pretrial motions until after the jury was sworn was to make certain that jeopardy attached so the government couldn't appeal. The instance is cited in my statement. I'll pass over it.

Frequently the rights of those defendants who are in custody have been abused by the delays caused by the court. One of the more serious problems faced by the U.S. Office during the term of William Lockhart, my predecessor, was the inability to bring in custody defendants to trial before Chief Judge Ritter within a reasonable time after arrest.

The following three cases are used to demonstrate the problem. One Rudy and one Kirkendahl were both charged with armed bank robbery involving separate incidents. Rudy was arrested on September 23, 1974, and Kirkendahl was arrested December 1, 1974. Karl Stock Smith was incarcerated on August 28, 1974, after being charged in an interstate bank fraud and he, too, was being held in custody under a high bond.

Despite repeated oral requests from U.S. Attorney Lockhart, Judge Ritter did not set these cases for trial until March 3, 1975, at which time he set all three cases for trial on the same day, giving the Government only 1 working day notice.

Defendant Rudy spent 6 months in jail awaiting his trial, while defendant Kirkendahl waited more than 4 months. Defendant Smith was convicted on March 11, 1975, after waiting 7 months in jail. Judge Ritter also postponed Smith's sentencing until July 11, 1975, and

accordingly he spent the better part of 1 year before his case was concluded.

I move to point 2 now: failure of the court to fully utilize the U.S. Magistrate. In the District Court of Utah, the U.S. Magistrate has been utilized very little. Several Federal agencies have made requests to the court that the U.S. Magistrate be utilized for the enforcement of minor offenses, but their requests have not been granted.

Since 1970, each U.S. Attorney has made similar requests of the court. Recently, I also made a request that the U.S. Magistrate be more fully utilized for the effective enforcement of minor offenses. That request was supported by letters of request and affidavits of need from the heads of nine Federal agencies in the State of Utah.

Based upon past history, however, I have little hope that this petition will be granted, notwithstanding the fact that I know that the second judge in the district is strongly in favor of it.

Although he refuses to delegate trial authority, Chief Judge Ritter resists hearing minor offenses and abuses the government prosecutor when such cases are filed with the court. For example, in March of 1975 under the tenure of William Lockhart, a man charged with the petty offense of illegal entrance on a military reservation appeared before Judge Ritter for arraignment.

The following excerpts from the transcript of that proceeding demonstrate the judge's attitude toward handling petty offenses in the district court. After some preliminaries, the court says, "What kind of petty offense was it? We don't entertain those petty offenses up there on the reservation. How did that one get in here?"

And again, the court said, "I don't think this case will last very quick. I think it will go out the door with wheels under it. . . ." The clerk then is asked to take the plea and he says, "How do you plead to the information, guilty or not guilty?" And the defendant says, "Not guilty." And the court then responds: "Good. That's what you should do. There's a question whether I'm going to handle it or not. I may throw it out. I don't take these petty offenses, you see. The military up there ought to run that reservation. They ought to run it. And when they find out they can't run it, at that point, particularly with respect to traffic offenses, they can't manage the traffic up there, so they want me to be a traffic policeman, traffic examiner, and dish out $1.50 fines. that sort of business. I'm not going to do it. It looks to me like this thing ought not to be here."

The prosecutor then tried to explain to the court that this was a complicated situation where the man had been given a bar letter, after he had been caught selling narcotics on the military reservation, and in violation of the bar letter had again come on the reservation. And so the prosecutor said, "I felt, your honor, that the petty offense justified the court's attention under the circumstances."

And the court responded: "The plea is not guilty. That's a proper plea in this case and we'll look at your cards when we get it on the calendar. And I think chances are that you won't have a big enough hand to stay in the game."

When this case came before the court for trial, he allowed the prosecutor to put on his case and then dismissed it. The need for an effec-

tive method of handling minor offenses in the district of Utah is readily apparent. Utah has within its boundaries 5 Indian reservations or areas of allotment, 5 major military installations, many Federal buildings, including a veteran's hospital, 5 national parks, and at least 10 other national monuments or recreation areas and 8 national forests.

In recent review of the need for better enforcement of the minor offenses in the district of Utah, it was disclosed: First, there is presently no way of enforcing minor traffic and parking infractions at Federal buildings and facilities; second, in spite of some enforcement of minor offenses in tribal courts, many minor violations of Federal laws occurring within Indian reservations have gone without sanction; third, within a 1-year period, it is estimated that over 2,500 petty offense violations occur within the national parks and monuments in the State of Utah; fourth, within the national forests it is estimated that over 250 cases in 1975 would have been handled through a Federal magistrate if that forum had been available; and fifth, within the military installations in Utah, many traffic offenses committed by nonmilitary personnel and minor offenses involving trespass or theft from the Government are committed without any law enforcement sanction because of the lack of an appropriate forum.

For such offenses, the enforcement mechanism used in all of the surrounding States around Utah is that of a fine or forfeiture of collateral. Such enforcement mechanisms are implemented with the assistance of the U.S. magistrate who oversees the collection of fines and is able to try cases involving minor offenses when such trial is necessary.

In the district of Utah, no such system exists because Chief Judge Ritter has failed to delegate minor offense trial jurisdiction to the magistrate or to institute a bail forfeiture system.

I pass now to point three of my four points, having to do with the manner in which Judge Ritter has administered grand juries in the district of Utah over the last 5 years and has thus hampered law enforcement.

At the present time, there is in the 10th Circuit Court of Appeals a petition for writ of mandamus to require Chief Judge Ritter to convene a grand jury for full term and to prohibit Judge Ritter from unlawfully interfering with or discharging the grand jury once it is convened.

This action was filed with the court of appeals on April 20, 1976. On April 21, the court of appeals ordered Judge Ritter to respond to the Government's mandamus action by April 26. On April 22, Judge Ritter issued an order for the empaneling of a grand jury and it was empaneled on May 10. The Court of Appeals for the 10th Circuit has retained jurisdiction on the subject of whether there might be interference with that grand jury.

During the last 5 years, a grand jury in the central division of the district of Utah has met to investigate crime on only 57 days. During 1971, a grand jury sat for 5 days. During 1972, a grand jury was convened only 1 day. A grand jury was not convened at all during 1973. During 1974, a grand jury sat only 15 days. During 1975, a grand jury sat for only 36 days.

Chief Judge Ritter has refused to convene a grand jury from December 4, 1975, until the filing of the petition for writ of mandamus

and this situation existed even though during that period four defendants refused to waive their constitutional right to indictment. And in court when they are arraigned, he will try to press them to waive that right and criticize their attorneys for not so advising them.

Because of the lack of a grand jury in the central division of the district of Utah, these four defendants could not be indicted nor prosecuted. On January 23 of this year, pursuant to rule 6 of the Federal Rules of Criminal Procedure, I filed a motion requesting that a grand jury be empaneled.

That motion was ignored by the court until finally I filed the mandamus proceeding. Such conduct on the part of Judge Ritter is part of a long, but consistent history of actions taken by the judge which have frustrated the grand jury process.

On February 10, 1975, at the request of U.S. Attorney William Lockhart, the Court convened a grand jury. Shortly thereafter, the Antitrust Division of the U.S. Department of Justice and the U.S. Attorney's Office commenced presenting cases to that grand jury. Sometime during the early part of April of 1975, Judge Ritter told U.S. Attorney Lockhart that the court was going to discharge the grand jury.

In order to salvage the work of that grand jury, which was then ongonig, Mr. Lockhart agreed to the entry of an order by the court limiting the function and scope of the grand jury. On April 25, 1975, Judge Ritter executed an order which limited the matters the Government could present to the grand jury to four specified investigations, including two antitrust investigations.

Thereafter, the judge often threatened in open court to discharge the grand jury. The antitrust investigation was halted when Judge Ritter refused to sign immunity orders and when he ordered that other immunity orders, signed, but not yet served, be returned to him.

The testimony of the 14 witnesses covered by the immunity orders was essential to the grand jury's continued investigation into price fixing in the District of Utah. The grand jury had already heard over 10 days of testimony from over 20 witnesses. Government attorneys assisting the grand jury had expended approximately 2,000 hours working on that investigation, including analyses of more than 250,000 subpenaed documents. The United States filed a petition for writ of mandamus with the 10th Circuit Court of Appeals on November 25 seeking an order to require Judge Ritter to sign the immunity orders. By reason of the court's declared intention to dismiss the grand jury, on December 4, 1975, I filed a motion requesting the grand jury be allowed to continue to sit to conclude its business.

That motion also asked the court to lift the restrictions imposed in the April 25 limiting order. Notwithstanding the plea made by the Government, and over the protests of the grand jury foreman, Judge Ritter discharged the grand jury while it was still investigating fraud and antitrust matters and while it still had over 8 months to serve.

Before convening a grand jury in 1974, the judge required the U.S. Attorney to submit to the court a list of those individuals who were to be investigated. Such conduct, together with the limitation order of April 25, constitutes an interference with the functions of the executive branch and with the processes of the grand jury.

My final point is that Chief Judge Ritter uses his powers in a manner adverse to the legitimate interests of the Federal Govern-

ment. A review of all of the criminal cases coming before Judge Ritter between the dates of November 7, 1975 and January 30, 1976, reveals the following.

One, a total of 22 cases were listed for trial. This does not include cases where pleas of guilty were entered. Two, out of those 22 cases, the Government prevailed in only two cases—10 percent. The same prosecutorial staff of my office experiences approximately 90 percent success in the northern division of the Utah District, which is certainly in keeping with the national average.

Three, in two of the remaining cases, the Government was able to obtain a stay of the proceedings in the Court of Appeals so that mandamus actions against Judge Ritter could be filed, but otherwise those two would have been dismissed.

And as a result of that 22-case experience, two mandamus actions and eight appeals have been approved by the Department of Justice and are now pending in the Court of Appeals. The extra workload caused by this large amount of appellate work necessarily affects the efficiency and quality of the important work assigned to the Office of the United States Attorney.

And I wish to sincerely thank this committee for giving me the opportunity to present the picture.

Senator BURDICK. Well, thank you very much for your contribution this morning.

Mr. CHILD. Mr. O'Brien would like to formally submit his written statement rather than read it.

Senator BURDICK. It will be received for the record.

[The above referred to statement follows:]

STATEMENT OF JAMES D. O'BRIEN, ACTING DEPUTY ASSISTANT ATTORNEY GENERAL, TAX DIVISION, DEPARTMENT OF JUSTICE BEFORE THE SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY, SENATE JUDICIARY COMMITTEE ON S. 1130

A BILL TO AMEND THE ACT OF AUGUST 6, 1958 (72 STAT. 497), RELATING TO SERVICE AS CHIEF JUDGE OF A UNITED STATES DISTRICT COURT, ON MAY 18, 1976

My name is James Dewey O'Brien and I am an Acting Deputy Assistant Attorney General of the Tax Division, Department of Justice. In that capacity, one of the Sections under my supervision is the Criminal Section of the Tax Division in which I entered on duty as a trial attorney almost 24 years ago. I welcome the opportunity to appear before you to recommend the enactment of S. 1130 to amend an Act of August 6, 1958 (72 Stat. 497).

As you know, the August 6, 1958, Act provides, generally, that the Chief Judge of a multi-judge district shall not retain that post beyond the age of 70 years. However, the portion of that Act which would be stricken by S. 1130 excepted the chief judge of any two-judge district so long as that chief judge sitting at the date of enactment continued in office. Only the Chief Judge of the United States District Court for Utah is presently within that exception.

Almost two decades have passed since Congress concluded that senior judges over 70 years of age should be relieved of the administrative burdens of the court. This conclusion was based on many years of experience, and events since that date have proved the wisdom of that general rule. We believe that rule should be uniform throughout the United States, for, whatever the reasons that led to the creation of this exception many years ago, the time has come when it is eminently clear that it is in the interests of the uniform administration of the laws that this exception be eliminated. The Court of Appeals for the Tenth Circuit has attempted to limit the problems existing in the United States District Court for the District of Utah by creating a new Division and restricting the authority of the Chief Judge of the District in the assignment and handling of cases in that Division. For the history of that effort, see *Utah-Idaho Sugar*

Company v. *Ritter*, 461 F. 2d 1100 (C.A. 10, 1972). But that partial solution gives no relief at all to the remaining Division presided over by the Chief Judge.

I am acutely aware of the seriousness that does, and should, attend a recommendation from a representative of the Executive Branch of Government which would affect the status of an incumbent federal judge. The Legislative Branch should, and will, I am sure, view these representations with some degree of skepticism. But, at the same time, we trust that, if this Committee has any doubt about the reality and extent of the problem or any of the statements outlined hereinafter, it will take appropriate action to assure itself of the facts. We are ready at all times to cooperate with this Committee toward that end. I also wish your Committee to understand that the following presentation is based primarily on representations to the Tax Division by successive United States Attorneys and their assistants and by attorneys of our own staff who have either supervised or tried tax cases in the District of Utah. However, most of the events related hereinafter happened in open court or are reported in published cases.

The matters complained of may be summarized under the following categories:

(1) the refusal to call grand juries for extended periods of time, resulting in the running of the statute of limitations in criminal tax cases and attempts by the court to determine what cases will be presented;

(2) a continued pattern of dismissal of indictments after the trial has commenced, jeopardy has attached, and the Government is without recourse by appeal or otherwise;

(3) the refusal to permit the Government to put in admissible evidence;

(4) refusal to instruct the jury in accordance with longstanding principles of law;

(5) setting large numbers of cases for trial on the same date and refusing to indicate in what order the cases will be called for actual trial, setting multiple hearings on short notice and reaching decisions without permitting argument; and

(6) last, but not least, for the dignity of a court and the treatment of its officers are of prime importance to our judicial system: an extended pattern of mistreatment in open court of United States Attorneys, Assistant United States Attorneys, and other attorneys for the Government, in repeated instances, threatening them with contempt and excluding them from the courtroom.

(1) As early as 1968 the then United States Attorney reported to us that the Chief Judge had refused a grand jury for approximately one year and had denied specific requests to do so. The refusal to call grand juries in 1973 with 15 months elapsing between grand juries resulted in the running of the statute of limitations in criminal tax cases. A former United States Attorney, now deceased, reported to us by letter that the Chief Judge had ordered him not to present certain cases to the grand jury.

(2) The Supreme Court held in *United States* v. *Jorn*, 400 U.S. 470 (1971), that, where the court dismissed the information after the trial commenced, the case could not be retried even though (page 487) the trial judge "made no effort to exercise sound discretion." In that criminal tax case, the Chief Justice, in a concurring opinion, characterized the actions of the Chief Judge of the District of Utah as representing a "plain frustration of the right to have this case tried, attributable solely to the conduct of the trial judge." The dissenting Justices said (p. 488) that they could not agree that when a trial judge abuses his discretion in declaring a mistrial on his own motion that a trial on the merits is foreclosed.

Since *Jorn*, there has been a pattern of dismissal of indictments and informations after the commencement of trial and there is no recourse for the Government under present law. In January 1976, in *United States* v. *Lloyd H. Hepworth* (Cr. 75–102), the Government sought to introduce evidence of the usual type in criminal tax cases. The court refused to admit the evidence and then dismissed the indictment on the ground of the Government's failure to produce evidence. The Government, of course, had no recourse. No written order was issued in the case. Recently, after a nontax case had been disposed of in similar fashion, counsel for two other defendants moved for dismissal of the indictments as to their clients on the grounds that the charges were similar to those just dismissed. The United States Attorney's office advises us that the Chief Judge then took these attorneys to task, stating, in effect, that it was the practice of the court to dismiss the indictment after the case goes to trial so that the case is fully disposed of. If this statement was intended to convey what

it appears to mean, then the policy of dismissal of indictments after the commencement of trial is not merely to be inferred from a pattern of events, but is a professed policy.

(3) and (4). In addition to the *Hepworth* case, the court did not allow in 1973 clearly admissible evidence in *United States* v. *Stout* (Cr. 43–72) and refused to give the standard instructions in criminal tax cases. In *United States* v. *Corbett* (Cr. 75–75), another criminal tax case, the court refused to give the usual instructions or, indeed, any instructions other than to tell the jury that the defendant had appeared to rely on another person. In both cases, the lack of the usual instructions and comments to the jury weighted toward the defendants resulted, in the views of the prosecutors, in the acquittals.

(5) It is repeatedly reported to us by the Office of the United States Attorney and attorneys of our own Division that as many as 40 cases are set for trial on the same date without stating the order in which the cases will be tried; that if the parties are not ready to go to trial, the case is sometimes dismissed or the parties are forced to go to trial without key witnesses. This, of course, takes up the time of attorneys for both sides and incurs additional costs by having the witnesses appear and reappear. More seriously, it interferes with the orderly administration of justice. On occasion, hearings are set with very little notice, with resettings, then counsel is sometimes given no chance to be heard after multiple appearances. This has been particularly burdensome on Government attorneys travelling from Washington, D.C., to Utah.

(6) Successive United States Attorneys have reported to us that the Chief Judge has barred certain Assistant United States Attorneys from his courtroom. At times between the years 1967 and 1973, the then United States Attorneys reported that two of their four assistants were barred at times, and that this caused a great hardship on a small office. Successive United States Attorneys, their Assistants, and other Government attorneys have reported that the Chief Judge used abusive and threatening language to them in open court.

The effect of the combined course of conduct described above has been to prevent the Government from carrying out its duty to enforce the criminal tax laws fairly and effectively in the Central Division of the District of Utah presided over by the Chief Judge. In connection with our supervision of criminal tax cases, it was brought to our attention that the Chief Judge had dismissed mail fraud charges against *Thomas Dee Stoker* (Cr. 86–70, USDC Utah) and issued a restraining order against prosecution of that individual in Wyoming on similar but different charges (Cr. 8543, USDC Wyo.) after the defendant brought a proceeding back in Utah. The United States District Court for the District of Wyoming ordered the trial to proceed and the defendant was convicted. The Chief Judge of the District Court for Utah then issued an order to the United States Attorneys for Utah and Wyoming to show cause why they should not be held in contempt. We understand the snow cause matter was not pursued.

It should be noted that this pattern of conduct has extended through several administrations, indicating that politics and personalities have nothing at all to do with the problem.

The Government's difficulties before the Chief Judge of the United States District Court for the District of Utah have by no means been limited to criminal cases. For example, in one civil tax case, the Chief Judge was reversed five times by the Court of Appeals for the Tenth Circuit (*Portland Cement Company of Utah* v. *United States*, 293 F. 2d 826; 315 F. 2d 169; 338 F. 2d 798; 378 F. 2d 91; 412 F. 2d 894).

The Court of Appeals for the Tenth Circuit, as shown in the *Utah-Idaho Sugar Company* case cited above, has done what it can to limit the problem geographically. We strongly urge the passage of S. 1130 as a solution to many of the problems in the United States District Court for Utah. Even if this situation did not exist, we would recommend the enactment of S. 1130 as removing an outmoded exception to the general rule, the wisdom of which has been demonstrated in the course of almost two decade: that judges over 70 years of age should be relieved of the administrative burdens of the United States District Courts and the United States Courts of Appeals.

Thank you for permitting me to submit this statement.

Mr. O'Brien. Copies have been submitted previously.

Mr. Child. Mr. Chairman, my reading of my statement deleted many parts and I hope the entire statement is received.

Senator Burdick. Your full statement will be received in the record.

Mr. Child. Thank you.

[The above referred to statement with appendixes follows:]

STATEMENT OF RAMON M. CHILD, UNITED STATES ATTORNEY FOR THE DISTRICT OF UTAH TO THE SUB-COMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY, OF THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE

It is not a pleasant task to criticize the work of an important man; however, I have been requested to briefly outline for this sub-committee the problems the United States Government, and in particular the Department of Justice, must face because of the manner in which the Honorable Willis W. Ritter, Chief Judge of the District of Utah, administers his court and cases. My statement is largely directed to criminal matters and is divided into four areas: (1) the methods utilized by the Chief Judge to process his cases through court and resulting delays; (2) the failure of the Chief Judge to implement a magistrate system which would permit the magistrate to try minor offenses and to establish a collateral system; (3) a description of the way in which the Chief Judge has administered grand juries over the last five years; and (4) a brief description of the effects of hostility demonstrated by the Chief Judge towards cases in which the United States is a party.

I. THE MANNER IN WHICH JUDGE RITTER PROCESSES THE CASES THROUGH HIS COURT

A. Calendaring of Criminal Cases for Trial

In the Central Division of the United States Court for the District of Utah there are no published Rules of Court. Chief Judge Ritter does not set criminal cases for trial at the time of arraignment nor does he give the usual 30 to 60 days notice. The Chief Judge rarely sets less than 20 cases for trial on any one calendar. That is, he uses the "trailing calendar" system.

During the last few years the number of trial calendars set up by the Chief Judge each year has declined. Consequently each trial calendar has contained a large number of cases for trial. It becomes an almost impossible task to prepare 20 to 30 criminal cases for trial when the government is given only a week's notice and often only two or three days' notice.

Because a large number of criminal cases were backlogged for trial, on August 1, 1975, I sent a memorandum to Judge Ritter advising him that there were 36 criminal cases awaiting trial and eleven criminal cases awaiting arraignment, including at least two important stock fraud cases (Exhibit 1). Upon inquiry from the Chief Judge as to when the government could be ready to try the two stock fraud cases, a subsequent memorandum was sent to the Judge on September 17, 1975, wherein I informed the court we could be prepared to try the cases on October 6, 1975 (Exhibit 2). Prior to that I had informed the court that in view of the large number of witnesses in the stock fraud cases we would need at least two or three weeks lead time to assemble those cases for trial. There were aproximately 130 witnesses involved in three of those stock fraud cases. On September 22, 1975, at 5:15 p.m. I received a memorandum from Chief Judge Ritter which stated that the two stock fraud cases would be tried commencing September 29, 1975, at 10:00 a.m. (Exhibit 3). It is of significance that these cases were being tried by Fraud Section attorneys who were residing in Washington, D.C.

On Friday, December 12 1975, late in the afternoon, my office received notice of a criminal trial calendar to commence at 10:00 a.m. on Thursday, December 18, 1975 (Exhibit 4). On that calendar 23 cases had been set for trial. Three of the first four cases were tax cases involving approximately 100 witnesses, many of whom resided out of the state. During this period of time in December 1975, United Air Lines was on strike, which created difficulty in getting people from one place to the other in this country. Christmas holiday traffic aggravated the situation as well. Consequently, on Monday, December 15, 1975, I filed a motion with the court requesting that we be given 21 days to prepare for that trial calendar and informing the court of the tremendous difficulty we would have in preparing and serving subpoenas and in securing witnesses on such short notice (Exhibit 5). Nevertheless, on Thursday, December 18 Judge Ritter held a call of the trial calendar. We had been able to get ready on only a couple of cases. Four cases were dismissed outright because the government did not

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have its witnesses present (Exhibit 6). All four of those cases are now on appeal. In one of those cases the court was informed by government counsel that the case could be ready by the time it was reached on the following Monday. Notwithstanding the fact that this case was number 20 on the calendar, the court stated: "The case is reached now," and then dismissed it (Exhibit 7). Judge Ritter required the government to try four other criminal cases on that calendar on Friday, the 19th of December. Sensing the mood of the court, defense counsel waived jury, and all four cases tried on the 19th were lost by the government. Because jeopardy attached in three of those cases, only one is on appeal. The other cases on the trial calendar the court reluctantly set over to January 5.

There are numerous other similar examples of such administration. For example, on January 12, 1976, we received notice of a 14-case calendar to be tried commencing January 14, 1976 (Exhibit 8). On November 14, 1975, the government received notice of a 23-case trial calendar to commence November 20, 1975 (Exhibit 9). On October 21, 1975, the government received notice that a 30-case calendar was to commence October 21, 1975 (Exhibit 10). On November 1, 1974, the government received a calendar which contained 31 criminal cases to commence on November 4, 1974 (Exhibit 11). On May 21, 1974, the government received a criminal calendar containing 19 cases to commence on May 28, 1974 (Exhibit 12).

Often when the cases are not ready because of the inability of the government to secure attendance of witnesses within the time noticed, the cases are dismissed. A typical example of this was the case of *United States* v. *Will Henry Savage*, CR–75–26. The case was noticed October 20, 1975, for trial on October 21, 1975 (Exhibit 13). The government filed a motion for continuance, which Chief Judge Ritter ignored (Exhibit 14). Judge Ritter dismissed the case on October 22, 1975, because the government had not been able to locate its witnesses (Exhibit 15). I have a staff of six assistants, but on a 20 to 30-case calendar, often we are talking upwards of 200 to 400 witneses to be subpoenaed and secured. Moreover, the attorneys need time to prepare their cases. Many cases, because of their complexity, merit definite trial dates. While I recognize that trailing calendars are used in some other courts, they are not used with such short notice. Further, most courts do not sandwich complicated stock and tax fraud cases in the middle of a trailing calendar as does Judge Ritter. You can perhaps recognize the difficulty in trying a complicated tax fraud case involving as many as one hundred witnesses in the middle of a calendar where that same attorney is required to try drug cases, theft from interstate shipment cases, and cases involving violence on an Indian Reservation.

B. Law and Motion Days

Judge Ritter does not hold rule days at which time defendants are arraigned, on a regular or even frequent basis. The last criminal rule day in the District of Utah was January 16, 1976.

It is axiomatic that effective administration of criminal justice demands that court machinery function swiftly. The present state of the Central Division criminal calendar is evidence of the prejudice to both the defendant and the government caused by delays in the calendaring of cases.

There are presently 32 cases involving 46 defendants awaiting arraignment in the Central Division. Of these defendants, 23 have either been arrested or served with summons and bound over for arraignment after preliminary hearing before the magistrate (Exhibit 16). However, none of these 23 defendants has yet been formally charged in an information or indictment. As of May 10, 1976, the elapsed time since arrest or service of summons in these 23 instances ranged from 26 to 150 days. The average is 99 days. (Twenty-one of these 23 cases exceed the 60-day time limit for filing an indictment or information under the Speedy Trial Act. 18 U.S.C. § 3161(b). However, § 3161(b) does not take effect until July 1, 1976, and the Interim Plan for Prompt Disposition of Criminal Cases in the District of Utah contains no interim time limit for filing an indictment or information.) No indictment was possible during this period because of the Chief Judge's refusal to convene a grand jury. No information could be filed or pleas taken during this period because of the Chief Judge's failure to schedule court time for the conducting of such business.

Furthermore, at present 23 defendants have been formally charged by indictment or information and await arraignment in the Central Division. They have been awaiting arraignment for a period ranging from 26 to 158 days (Exhibit 16a). The average wait as of May 10, 1976, was 66 days. This is a period of

time in which these defendants have had no opportunity to plead not guilty and defend the charge or plead guilty and bring the matter to a swift conclusion. In 21 of these 23 instances, the Chief Judge has failed to meet the specific time requirement of § 2(a) of the Interim Plan for Achieving Prompt Disposition of Criminal Cases in the District of Utah, which he and the Associate Judge adopted pursuant to the requirements of Rule 50(b), Federal Rules of Criminal Procedure. Section 2(a) of the Court's plan requires that a defendant must be arraigned within 30 days from the date the information or indictment is filed.

When a rule day is established a large number of cases appear on the rule day calendar. This limits the amount of time that the Judge can spend with each case. This is a particular problem when a motion to suppress evidence or when a motion to dismiss has been filed by defense counsel. The Judge's usual practice is to defer hearing motions to dismiss or suppress until the time of trial. That means he defers a ruling on the motion until after a jury has been picked and sworn, thereby causing jeopardy to attach and thus depriving the government of its right to appeal an adverse ruling. In point of fact, the Chief Judge made a statement in a particular case wherein he admitted that his purpose in delaying pretrial motions until after a jury was sworn, was to make certain that jeopardy attached so the government couldn't appeal (Exhibit 17). The Chief Judge had just ruled against the government in a case involving a crime of violence on an Indian Reservation and dismissed the case. Defense counsel, in a following and similar case, to wit: *United States* v. *Gerald Mountainlion* and *Ronnie Appawoo*, CR–75–72, was observing in the courtroom. He addressed the Court and pressed to have his similar pretrial motion heard before the jury was picked:

THE COURT. You are not representing your client very good. You are overlooking smething that a practical man ought to think about. *Defendant in the preceding case was in jeopardy.*

DEFENSE COUNSEL. I recognize that.

THE COURT. He was confronting a jury. Now you are pushing your luck here. If I rule on this motion before you confront a jury and that constitutional question is litigated for the next ten years and goes up to the Supreme Court of the United States and in the meantime the government amends, you have done your client a very great disservice, because there is no bar to him being prosecuted.

DEFENSE COUNSEL. Well, that is a possibility, Your Honor.

THE COURT. It is not only a possibility. That is what will happen. *Now, I have been trying to handle all these cases on this calendar by having a jury in the box there and not listening to your arguments about anything.* You push in here now at a time when the motion isn't even set down for argument, and you have got your client in a fix where he may be twice tried for this thing. Now, that is poor legal representation from my point of view, and I am going to do what I can to protect him against his counsel, and we will just keep that right where it is and get a jury for you one of these days, and when we get the matter up before the jury we will get far enough down the way with the evidence to see what is involved and then we will entertain your motion. I don't want to be trying these cases again. *I am interested in the court docket as much as I am the Indian boy, but he ought to have the benefit of double jeopardy defense.* If he is prosecuted once that ought to be enough. That will be all.

Regarding this particular problem, the Department of Justice has filed with the Tenth Circuit Court of Appeals a petition for writ of mandamus requiring the Chief Judge to hear pretrial motions in accordance with Rule 12(e) of the Federal Rules of Criminal Procedure. Rule 12(e) specifically provides: "A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, *but no such determination shall be deferred if a party's right to appeal is adversely affected.* . . ." The Tenth Circuit has ordered Judge Ritter to respond to the government's petition for mandamus. To my knowledge, the Chief Judge has not filed a response.

In the case I just cited to you the issue involved the constitutionality of an act of Congress. Certainly the Court of Appeals should have the opportunity to decide that. However, it was Judge Ritter's intention to deprive the government of that opportunity.

Frequently the rights of those defendants who are in custody have been abused by the delays caused by the court. One of the more serious problems faced by the United States Attorney's Office during the term of William Lockhart was the inability to bring in-custody defendants to trial before Chief Judge Ritter within

a reasonable time after arrest. The following three cases are used to demonstrate the problem.

Samuel Geist Rudy and Donald Devon Kirkendahl were both charged with armed bank robbery involving separate incidents. Rudy was arrested on September 23, 1974, and Kirkendahl was arrested December 1, 1974. Both men were held in custody under high bond because of the seriousness of their crimes and their past criminal records. Karl Stock Smith was incarcerated on August 28, 1974, after being charged in an interstate bank fraud scheme. He, too, was held in custdy under high bond because of his criminal record and other considerations. Despite repeated oral requests from United States Attorney Lockhart, Judge Ritter did not set these cases for trial until March 3, 1975, at which time he set all three cases for trial on the same day, giving the government only one working day notice. Defendant Rudy spent six months in jail awaiting his trial, while defendant Kirkendahl waited more than four months. Defendant Smith was convicted on March 1, 1975, after waiting seven months in jail. Judge Ritter also postponed Smith's sentencing until July 11, 1975. Accordingly, Smith spent nearly one year in the County Jail waiting for his case to be concluded.

Thus, absent appropriate written Rules of Practice and notwithstanding the Interim Plan adopted by the Court, the administration of criminal justice in the District of Utah is being frustrated by the practice followed by Chief Judge Ritter in calendaring cases, holding rule days and ruling on motions in criminal cases.

II. FAILURE TO FULLY UTILIZE THE U.S. MAGISTRATE

In the District of Utah, the United States Magistrate has been utilized very little. Since 1968 U.S. Magistrates have been authorized by law to try and to sentence persons who have committed petty and misdemeanor offenses when the judges of the district have delegated such authority to the Magistrate. 18 U.S.C. § 3401. In every district except the Northern District of West Virginia and the District of Utah such a delegation of authority is in existence.

In the District of Utah several federal agencies have made requests to the Court that the U.S. Magistrate be utilized for the enforcement of minor offenses, but their requests have not been granted. Since 1970 each U.S. Attorney has made similar requests of the court. During the tenure of C. Nelson Day, such a request was made on numerous occasions. During the tenure of the Chief Judge's own interim appointee, William J. Lockhart, similar requests were made. Mr. Lockhart tried unsuccessfully to persuade the court as to the need for trial authority in the magistrate and a bail forfeiture system.

Recently I have also made a request that the U.S. Magistrate be more fully utilized for the effective enforcement of minor offenses. Based upon past history I have little hope that this petition will be granted.

In delegating minor offense jurisdiction to the U.S. Magistrate, a concurrence of a majority of the judges of the district court is required. Absent such a concurring majority, the decision is left to the Chief Judge. Thus, in the District of Utah, where there are two federal judges, the favorable vote of the Chief Judge is controlling for any decision to delegate minor offense jurisdiction to the Magistrate. I am confident a different Chief Judge would effect these reforms.

Absent the use of the U.S. Magistrate the only available forum for the enforcement of minor federal offenses is that of the U.S. District Court. However, for a large part of the district, that forum is not realistically available for enforcement because of Judge Ritter's attitude toward minor offenses. Although he refuses to delegate trial authority, Chief Judge Ritter resists hearing minor offenses and abuses the government prosecutor when such cases are filed in his court. For example, in March of 1975, under the tenure of William Lockhart, a man charged with the petty offense of illegal entrance on a military reservation appeared before Judge Ritter for arraignment. The following excerpts from a transcript of that proceeding demonstrate the Judge's attitude toward handling petty offenses in the district court (Exhibit 19).

The COURT. . . . What kind of petty offense was it? We don't entertain those petty offenses up there on the reservation. How did that one get in here?

* * * * * * *

The COURT. I don't think this case will last very quick. I think it will go out the door with wheels under it. . . .

* * * * * * *

The CLERK. How do you plead to the information, guilty or not guilty?

The DEFENDANT. Not guilty.

The COURT. Good. That's what you should do. There's a question whether I'm going to handle it or not. I may throw it out. I don't take these petty offenses, you see. The Military up there ought to run that reservation. They ought to run it. And when they find out they can't run it, at that point, particularly with respect to traffic offenses, they can't manage the traffic up there, so they want me to be a traffic policeman, traffic examiner, and dish out dollar-and-a-half fines, that sort of business. I'm not going to do it. It looks to me like this thing ought not to be here.

[The PROSECUTOR]. I felt, your Honor, that the petty offense justified the Court's attention under the circumstances.

The COURT. The plea is not guilty. That's a proper plea in this case, and we'll look at your cards when we get it on the calendar, and I think chances are that you won't have a big enough hand to stay in the game.

When this case came before the court for trial, the Judge dismissed it after hearing the government witnesses (Exhibit 20).

The need for an effective method of handling minor offenses in the District of Utah is readily apparent. Utah has within its boundaries five Indian reservations or areas of allotments involving exclusive federal jurisdiction; five major military installations; and many federal buildings which all involve the exclusive jurisdiction of the United States Government. There also exist five National Parks and at least ten other National Monuments or Recreation Areas where the federal government is charged with the responsibility of the enforcement of regulations and petty offenses promulgated for the protection and preservation of these scenic areas. In addition, there are eight National Forests encompassing hundreds of thousands of acres within the State of Utah where regulations for the protection of our natural resources and the people who use the National Forests must be enforced.

A recent review of the need for better enforcement of minor offenses in the District of Utah disclosed the following: (1) there is presently no way of enforcing minor traffic and parking infractions at federal buildings and facilities; (2) in spite of some enforcement of minor offenses in tribal courts, many minor violations of federal laws occurring within Indian Reservations have gone without sanction; (3) within a one-year period it is estimated that over 2,500 petty offense violations occur within the National Parks and Monuments in the State of Utah; (4) within the National Forests it is estimated that over 250 cases in 1975 would have been handled through a federal magistrate if that forum had been available; and (5) within the military installations in Utah, many traffic offenses committed by non-military personnel and minor offenses involving trespass or theft from the government are committed without any law enforcement sanction because of the lack of appropriate forum.

For such offenses as these, the enforcement mechanism used in surrounding jurisdictions is that of a fine or forfeiture of collateral system. Such enforcement mechanisms are implemented with the assistance of the U.S. Magistrate who oversees the collection of fines and is able to try cases involving minor offenses when such trial is necessary. In the District of Utah no such system exists because Chief Judge Ritter has failed to delegate minor offense trial jurisdiction to the Magistrate or to institute a bail forfeiture system.

The extent of the need for better utilization of the U.S. Magistrate as described above has been documented by letters from nine heads of federal agencies and affidavits from nine key federal law enforcement personnel. These documents were appended to a petition to the judges of the district court in our most recent effort to obtain a delegation of minor offense jurisdiction for the U.S. Magistrate.

Without the effective use of the U.S. District Court as a forum for the enforcement of minor offenses, and without the appropriate delegation of authority being made to the U.S. Magistrate, violations of federal laws and regulations will continue to go unenforced in the District of Utah.

III. THE MANNER IN WHICH JUDGE RITTER HAS ADMINISTERED GRAND JURIES IN THE DISTRICT OF UTAH OVER THE LAST FIVE YEARS HAS GREATLY HAMPERED THE ENFORCEMENT OF CRIMINAL LAWS IN THE DISTRICT OF UTAH

At the present time there is in the Tenth Circuit Court of Appeals a petition for writ of mandamus to require Chief Judge Ritter to convene a grand jury for

full terms, and to prohibit Judge Ritter from unlawfully interfering with or discharging the grand jury once convened. The specific relief requested is as follows: (1) forthwith convene a regular grand jury; (2) follow the procedures specified in Rule 6 of the Federal Rules of Criminal Procedure and 28 U.S.C. § 1861, *et. seq.* to effectuate the convening of a lawful grand jury; (3) allow said grand jury to sit for its full term unless both the United States Attorney and the foreman agree to a dismissal on an earlier date or unless the grand jury by a majority vote requests to be discharged on an earlier date; (4) allow said grand jury to met and take evidence as often as it deems necessary and at regular intervals; (5) allow said grand jury to investigate any matter it deems proper; (6) allow the office of the United States Attorney for the District of Utah to present to the grand jury such matters it deems necessary in the public interest; and (7) sign and enforce all immunity orders obtained in accordance with the provisions of Title 18. United States Code, § 6001, *et. seq.*

This action was filed with the Court of Appeals on April 20, 1976. On April 21, 1976, the Court of Appeals ordered Judge Ritter to respond to the government's mandamus action by April 26, 1976. On April 22, 1976, Judge Ritter issued an order for the empanelling of a grand jury. A grand jury was empanelled on May 10, 1976. The Court of Appeals for the Tenth Circuit has retained jurisdiction over the Petition pending further developments. The facts which led to the filing of the mandamus and which are pertinent inquiry are as follows.

During the last five years a grand jury in the Central Division of the District of Utah met to investigate crime on only 57 days. During July of 1971 a grand jury sat five days. During 1972 a grand jury was convened for only one day, and that was because a defendant had been charged with a capital offense. A grand jury was not convened at all during 1973. During 1974 a grand jury sat for only 15 days, and during 1975 a grand jury sat for only 36 days. Chief Judge Ritter has refused to convene a grand jury from December 4, 1975, until the filing of the petition for write of mandamus.

This situation existed even though four defendants refused to waive their constitutional right to indictment (Exhibit 21). Because of the lack of a grand jury in the Central Division of the District of Utah these four defendans could not be indicted or prosecuted.

On January 23, 1976, pursuant to Rule 6 of the Federal Rules of Criminal Procedure, I filed a motion requesting that a grand jury be empanelled (Exhibit 22). As grounds for this motion I emphasized: (1) the public interest requires that certain matters be inquired into and that alleged criminal offenses be investigated to determine if indictments should issue; (2) that four defendants had refused to waive indictment and required presentment; and (3) that it was probable that the antitrust laws are being violated in the District of Utah and that such probability required an investigation. As of the date the grand jury mandamus action was filed, Chief Judge Ritter had ignored the fact that four defendants had requested presentment and that the United States Attorney had certified to the Court that the public interest required the convening of a grand jury to inquire into violations of the United States Criminal Code which are occurring in the Central Division of the District of Utah. Such conduct on the part of Judge Ritter is part of a long, but consistent, history of actions taken by the Judge which have frustrated the grand jury process.

On February 10, 1975, at the request of United States Attorney William Lockhart, the court convened a grand jury. Shortly thereafter the Antitrust Division of the United States Department of Justice and the United States Attorney's office commenced presenting cases to that grand jury. Sometime during the early part of April 1975, Judge Ritter told United States Attorney William J. Lockhart that the court was going to discharge the grand jury. In order to salvage the work of that grand jury, Mr. Lockhart agreed to the entry of an order by the Court limiting the grand jury.

On April 25, 1975, Judge Ritter executed an order which limited the matters the government could present to the grand jury to four specific investigations, including two antitrust investigations (Exhibit 23). Thereafter the Judge often threatened in open court to discharge the grand jury. As noted in the April 25th order, in one of the antitrust investigations over 250,000 documents had been produced in compliance with grand jury subpoenas. In a fraud investigation listed in that order, over 2,000 documents had been produced. The government was not allowed to complete either of those investigations. The antitrust investigation was halted when Judge Ritter refused to sign immunity orders obtained in compliance with § 6001, *et. seq.* of Title 18, United States Code, and when he ordered that other immunity orders not yet served be returned to him.

This occurred in a meeting with the United States Attorney and an attorney from the Antitrust Division of the Justice Department held in chambers on August 26, 1975. Three immunity orders signed May 13, 1975, and one signed July 28, 1975, were returned. The immunity orders either returned or not signed totaled fifteen.

On August 28, 1975, I delivered a letter to Judge Ritter renewing the request to issue immunity orders and asking him to reconsider his decision. That letter was accompanied by a memorandum of law regarding the district court's lack of discretion with respect to issuance of immunity orders as well as an application by the United States Attorney for orders to compel testimony of 14 witnesses, with the necessary authorizations of the Assistant Attorney General attached.

On September 3, 1975, the United States was advised orally by the clerk that Judge Ritter would not sign any orders compelling testimony. Another motion to reconsider his decision was submitted to Judge Ritter on October 6, 1975, but again he refused to sign.

The testimony of the 14 witnesses was essential to the grand jury's continued investigation into price fixing in the District of Utah. The grand jury had already heard over ten days of testimony from over 20 witnesses. Government attorneys assisting the grand jury had expended approximately 2,000 hours working on this investigation, including analysis of more than 250,000 subpoenaed documents.

The United States filed a petition for a writ of mandamus with the Tenth Circuit Court of Appeals on November 25, 1975, seeking an order to require Judge Ritter to sign the immunity orders.

On December 4, 1975, I filed a motion requesting the grand jury be allowed to continue to sit to conclude its business (Exhibit 24). That motion also asked the court to lift the restrictions imposed in the April 25, 1975, order. Notwithstanding the plea made by the government and over the protest of the grand jury foreman Judge Ritter discharged the grand jury while it was still investigating fraud and antitrust matters.

In his report to the court, the grand jury foreman told Judge Ritter. "the Grand Jury is currently considering other matters . . . but is not ready to report on them at the present time . . . ." At the conclusion of the court's remarks discharging the grand jury, the foreman asked if he could be heard, and stated:

"The Grand Jury would like to thank you for the opportunity that we have had as serving as federal grand jurors in representing the people of the United States of America; but *we are deeply concerned*, and we have been for some time about the fact of unfinished business.

"We haven't felt it a hardship, you know, to meet and to act in this capacity; and we would like to at this time, with your permission, to complete the investigations that still haven't completed." (emphasis added) (Exhibit 25)

Thereafter the court instructed the foreman, "We will do as I say." Thus, the one grand jury that was convened in 1975, while it still had eight months to tions because: (1) the court refused to sign some fifteen immunity orders; (2) the court limited the matters the grand jury could investigate; and (3) the court prematurely discharged the grand jury.

Before convening a grand jury in 1974 the Judge required the United States Attorney to submit to the court a list of those individuals who were to be investigated (Exhibit 26). Such conduct, together with the limitation order of April 25, 1975, constitutes an interference with the functions of the Executive Branch.

The manner in which Judge Ritter has administered the grand jury system has frustrated the enforcement of federal criminal law in the District of Utah.

IV. THE CHIEF JUDGE USES HIS POWERS IN A MANNER ADVERSE TO THE LEGITIMATE INTERESTS OF THE FEDERAL GOVERNMENT

A review of all criminal cases coming before Judge Ritter between the dates of November 7, 1975, and January 30, 1976, reveals the following: (1) a total of 22 cases were listed for trial (does not include cases where pleas of guilty were entered); (2) out of those 22 cases the government prevailed in only two cases (the same prosecutorial staff experiences approximately 90 per cent success in the Northern Division of the Utah District, which is more in keeping with national averages); (3) in two of the remaining cases the government was able to obtain a stay of the proceedings in the Court of Appeals so that mandamus actions against Judge Ritter could be filed; (4) in 17 cases Judge Ritter dismissed charges against defendants; (5) in 2 cases verdicts of not guilty were returned by juries after being erroneously or prejudicially instructed on the law by the

Judge; (6) in one case Judge Ritter directed judgment of acquittal after the jury had returned a verdict of guilty; (7) approval for filing appeals or mandamus actions were sought from the Department of Justice in 12 cases, with the result that two mandamus actions and eight appeals were approved and are now pending in the Court of Appeals. In addition, two other mandamus actions against Judge Ritter challenging the legality of his conduct are presently pending in the Court of Appeals, as are 22 other criminal appellate matters.

The extra workload caused by this large amount of appellate work necessarily affects the efficiency and quality of the important work assigned to our office.

AUGUST 1, 1975.

Re pending criminal cases
Hon. WILLIS W RITTER,
Chief Judge,
U.S. District Court.
RAMON M. CHILD,
U.S. Attorney.

I enclose for your information summary of 36 criminal cases awaiting trial as of this date before the Utah District Court—Central Division.

On June 6, 1975 I supplied the Court with a similar inventory of criminal matters awaiting trial. At that time there were 43 items on the calendar. The Court arranged to have Judge Sherrill Halbert come to the District and as a result of his efforts 16 matters on that calendar have been disposed of.

In addition to the 36 criminal cases now awaiting trial, there are also 11 criminal cases awaiting arraignment. A summary of those cases is also attached hereto for the Court's information.

CR-74-99 (Buchanan) was cancelled by Judge Halbert. Forty-five witnesses were served subpoenas and are on a standby basis. A jury was also selected. The case could be disposed of in a two-day trial.

CR-74-52 (Rio DeOro) was also cancelled by Judge Halbert. More than sixty witnesses were subpoenaed and are on a standby basis. This case will probably require approximately two weeks to try.

Your advice and assistance would be appreciated.

Respectfully,

RAMON M. CHILD,
U.S. Attorney.

SEPTEMBER 17, 1975.

Hon. WILLIS W. RITTER,
Chief Judge, U.S. District Court, District of Utah.
RAMON M. CHILD,
U.S. Attorney.

PENDING TRIAL CALENDAR: At the Court's request I have contacted the Acting Director of the Fraud Section of the Criminal Division, Department of Justice, regarding pending criminal cases CR-74-52 and CR-74-53. I am informed that the prosecutors assigned to these cases by the Department of Justice will be prepared to proceed with trial, if the Court desires, on October 6, 1975 with CR-74-52 to be tried commencing on that date and CR-74-53 to follow in turn. There is a possibility that pleas may enter in CR-74-53 but the possibility of pleas in CR-74-52 is considered remote.

If the Court directs trials to commence September 29, the prosecution will make every attempt to be prepared. Such date would be the earliest possible date in which prosecution could be prepared and it is felt the preparation would be less than adequate for an efficient presentation of the Government's case. If the Court must set trial date to commence prior to October 6, we would appreciate a commencing date to be as close to October 6, as possible.

Thank you for your consideration in these matters.

OFFICE MEMORANDUM—U.S. GOVERNMENT

SEPTEMBER 22, 1975.

To: Ramon M. Child, U.S. Attorney.
From: Willis W. Ritter, Chief Judge.
Subject: Pending Trial Calendar.

Receipt is acknowledged of your memo of September 17, 1975 regarding cases CR-74-52 and CR-74-53. Case No. CR-74-52 (*United States* v. *Rio De Oro Mining Co., et al.*) is set for September 29, 1975 at 10:00 a.m. in my Courtroom. Case No. CR-74-53 (*United States* v. *Richard T. Cardall, et al.*) is set to follow upon conclusion of CR-74-52.

The Court expects all counsel to be present with witnesses and prepared to go to trial.

WILLIS W. RITTER,
Chief Judge.

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JURY TRIALS BEFORE HONORABLE WILLIS RITTER

COMMENCING THURSDAY, DECEMBER 18, 1975

10:00 A. M.

COUNSEL ARE INSTRUCTED TO KEEP IN TOUCH WITH THE CLERK AND WITH THE ATTORNEYS IN THE CASES THAT PRECEDE THEM. YOUR CASE WILL BE TRIED AS SOON AS THERE IS A DISPOSITION OF THE CASES AHEAD OF YOU. FREQUENTLY THE CASES ARE SETTLED RATHER THAN TRIED, AND THE RESPONSIBILITY TO KEEP INFORMED AND PREPARED TO GO TO TRIAL RESTS UPON COUNSEL.

Cr 74-98	United States of America	Max D. Wheeler
No. 1	vs	
	David W. Clayton	J. Thomas Bowen, appt.
	(Willful failure to file tax returns)	
HEARING:	Defendant's motion to dismiss information Defendant's motion to suppress evidence	

Cr 75-73	United States of America	Max D. Wheeler
No. 2	vs	
	John Emery Angel	Earl Dillman, ret.
	(Assault)	

Cr 75-75	United States of America	Max D. Wheeler
No. 3	vs	
	George Boyd Corbett	Orrin Hatch; Walter Plumb, III - ret
	(Willful failure to file tax returns)	
HEARING:	Defendant's motion to quash Defendant's motion to disqualify judge	

Cr 75-79	United States of America	Rodney G. Snow
No. 4	vs	
	Thomas Warner Hoopes	
	(Willful failure to file income tax returns)	EXHIBIT 4

Cr 75-80	United States of America	Rodney C. Snow
No. 5	vs	
	Ray M. Ruesch and Roger E. Backus	Sumner J. Hatch - Ruesch; Daniel Boone - Backus
	(Illegal Hunting)	

Cr 75-90	United States of America	Max D. Wheeler
No. 6	vs	
	Bobby D. Bates	Phil L. Hansen - ret.
	(Possession of Pornographic Materials with intent to distribute)	

Cr 75-101	United States of America	Steven Snarr
No. 7	vs	
	Little Dutch Boy Bakeries, Inc., William W. Morris, Alfred J. Taggard and Frank Bakker	Norman S. Johnson - Dutch Orrin Hatch - Morris; Bruce Findlay - Bakker Gerald R. Miller - Taggard
	(Adulteration of food held for sale after shipment in interstate commerce; introduction of adulterated food into interstate commerce)	

Cr 75-102	United States of America	Max D. Wheeler
No. 8	vs	
	Cloyd H. Hepworth, dba, Certified Manufacturing and Supply, Inc.	Richard Leedy - ret.
	(Willful failure to file tax returns)	

Cr 75-109	United States of America	Michael Hunter
No. 9	vs	
	LaVar William Ferguson	Gary H. Weight; [illegible] - ret.
	(False statement to federally insured institution)	

Cr 75-110	United States of America	Max Wheeler
No. 10	vs	
	Allan D. LeMon and Gary LeMon	Bruce C. Lubeck - ret. [illegible]
	(Counterfeiting)	

HEARING: Redetermination of bail.

Cr 75-111	United States of America	Steven W. Snarr
No. 11	vs	
	David Baker	John R. Anderson - appt.
	(Interstate transportation of falsely made,	

Cr 75-112	United States of America	Michael Hunter
No. 12	vs	
	Sherman Glen Kay	Don Blackham; Dean R. Mitchell - ret.
	(Possession of unregistered firearm)	

Cr 75-115	United States of America	Max Wheeler
No. 13	vs	
	Bruce E. Mav	James Barber - ret.
	(Wire Fraud)	

Cr 75-116	United States of America	Michael Hunter
No. 14	vs	
	Frank Steve Brzoticky	John H. Allen - appt.
	(Unlawful transportation of firearm)	

Cr 75-117	United States of America	Michael Hunter
No. 15	vs	
	Wesley V. Calloway and Curtis Ray Green	Robert J. Schumacher; Dale J. Craft - appt.
	(Dyer Act)	

Cr 75-118	United States of America	Rodney Snow
No. 16	vs	
	John Helis Porter	Richard G. Allen - appt.
	(Uttering and Passing Counterfeit Obligation of United States)	

Cr 75-120	United States of America	Max Wheeler
No. 17	vs	
	Hoskie Lansing and Herman Farley	Larry J. Echohawk - Lansing; D. Gilbert Athay - Farley each appt.
	(Rape on Indian Reservation)	

HEARING: Def. Lansing's motion to dismiss

Cr 75-121	United States of America	Michael Hunter
No. 18	vs	
	Lynn D. Moren and Main Motors, Inc.	M. Byron Fisher - ret.
	(False statements in Loan Application)	

No. 19	vs		
	Craig William McLachlan		Gilbert Athay - ret.
	(False Statement in Loan Application)		
Cr 75-123	United States of America		Max D. Wheeler
No. 20	vs		
	Kevin W. Barney and James Scott Liddiard		Phil L. Hansen - ret.
CONSOLIDATED	(Arson in National Forest)		
Cr.75-125	United States of America		Steven Snarr
	vs		
	Lynn D. Lossee		Phil L. Hansen - ret.
	(Arson)		
Cr 75-127	United States of America		Max Wheeler
No. 21	vs		
	Peter T. Lorenz		Sumner J. Hatch - ret.
	(Giving false information in acquisition of firearm; interstate transportation of firearm by felon)		
HEARING: Def's motion to suppress evidence			
Cr 75-129	United States of America		Rodney Snow
No. 22	vs		
	James Killian		Richard T. Ashton - appt.
	(Dyer Act)		
Cr 75-76	United States of America		Ramon M. Child; Anthony E. Desmond
No. 23	vs		
	Countryside Farms, Inc.; Egg Products Company; Olson Farms, Inc., Snow White Egg Company; R. Kent Christofferson; Gilbert T. Cochran		Clifford L. Ashton & Ricardo Ferrari - Countryside Farms & Christofferson; Herschel Saperstein - Egg Products; Harold G. Christensen Olson Farms & Cochran Robert W. Brandt - Snow White
	(Conspiracy in restraint of Interstate Trade and Commerce)		

HEARING:
(1) Def. Egg Product's motion for bill of particulars
(2) Def. Egg Product's motion for inspection & copying of grand jury testimony
(3) Def. Egg Product's motion for discovery and inspection
(4) Def.Olson Farms & Cochran's amended motion for discovery and inspection

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

MOTION FOR 21 DAYS ADVANCE NOTICE FOR TRIAL CALENDAR

Comes now Roman M. Child, United States Attorney for the District of Utah, for and on behalf of the United States of America, and respectfully requests that this Honorable Court give the Government a minimum of 21 days to prepare for the Court's present trial calendar, and for cause shows the Court as follows:

1. The United States received the Court's present trial calendar, which is scheduled to commence on December 18, 1975, during the late afternoon of Friday, December 12, 1975.

2. There are a substantial number of witnesses that must be subpoenaed in the first, third and fourth cases on the calendar, which are tax fraud cases, and subpoenas cannot be prepared by the United States Attorney's office and served by the United States Marshal's office on three working days notice.

3. A substantial number of the cases on the Court's calendar will require the presence of witnesses who reside outside the State of Utah. Most of those witnesses will be unable to be present because of the inability to arrange travel through the airlines. Due to the airline strike which has crippled United Airlines and due to the usual Christmas pressure placed upon the airlines, flights in and out of Salt Lake City are already overbooked, and the Government would be unable to secure its witnesses by reason of the airline problem.

4. The United States Marshal Service has advised the United States Attorney's office that they would need at least ten days advance notice for service of any subpoena. The United States Attorney is desirous of honoring the request of the United States Marshal Service in assisting them in performing their difficult task by giving them a reasonable time within which to serve subpoenas.

5. Based on the foregoing, the United States Attorney respectfully informs the Court that the Government cannot be ready to try any of the following cases on the Court's calendar earlier than January 5, 1976:

CR-74-98—U.S. v. David W. Clayton.
CR-75-75—U.S. v. George B. Corbett.
CR-75-79—U.S. v. Thomas W. Hoopes.
CR-75-101—U.S. v. Little Dutch Boy Bakeries, et al.
CR-75-102—U.S. v. Cloyd H. Hepworth.
CR-75-109—U.S. v. LaVar Wm. Ferguson.
CR-75-110—U.S. v. Allan and Gary LeMon.
CR-75-111—U.S. v. David Baker, dismissed.
CR-75-115—U.S. v. Bruce E. Maw.
CR-75-116—U.S. v. Frank S. Brzoticky, dismissed.
CR-75-117—U.S. v. Wesley V. Calloway and Curtis Ray Green.
CR-75-120—U.S. v. Hoskie Lansing and Herman Farley.
CR-75-121—U.S. v. Lynn D. Noren & Main Motors.
CR-75-129—U.S. v. James Killian, guilty.
CR-75-76—U.S. v. Countryside Farms, et al.

As to the remaining cases on the Court's calendar, we are not yet informed as to the success the United States Marshal may have in serving subpoenas and securing the attendance of both defendants and witnesses in light of transportation problems and the holiday season. We are informed that some in-state witnesses have left the State for the holidays.

6. For the foregoing reasons the Government respectfully requests that the Court's criminal trial calendar not commence earlier than January 5, 1976.

Respectfully submitted this 15th day of December 1975.

RAMON M. CHILD,
U.S. Attorney.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

(Cr 75-111)

UNITED STATES OF AMERICA, *Plaintiff,*

v.

DAVID BAKER, *Defendant.*

SALT LAKE CITY, UTAH,
December 18, 1975.

Before: The Honorable Willis W. Ritter, Chief Judge.

TRANSCRIPT OF PROCEEDINGS

Appearances: For the United States: Steven Snarr, Assistant U.S. Attorney, 200 P.O. & Courthouse Building, Salt Lake City, Utah.

For the Defendant: John R. Anderson, Attorney at Law, Boston Building, Salt Lake City, Utah.

DECEMBER 18, 1975.

The COURT. Baker.
Mr. ANDERSON. Yes, your Honor.
The COURT. All right. Are you ready?
Mr. ANDERSON. Yes, your Honor.
Mr. SNARR. Your Honor, the government is not. We have Mr. John Olliver from Denver, Colorado, and George Lewis from San Bruno, California, that we have not been able to secure as witnesses because of transportation difficulties.
The COURT. Now, what is the falsely made security in this case? Tell me about it.
Mr. ANDERSON. Your Honor, we think that the government has charged—well, this would be developed later on in the trial. What it is, your Honor, it is a $180 American Express money order.
I made a motion to the Court to dismiss this matter for lack of a speedy trial under the Constitution. This man has been——
The COURT. When?
Mr. ANDERSON. This man has been in continuous custody for five months. And I think that is prima facie too long.
The COURT. I agree. The case is dismissed.
Mr. ANDERSON. Thank you, your Honor. I will have an order over here.
The COURT. Five months and they are still not ready.

* * * * * * *

CERTIFICATE

I, Barbara G. Andersen, Registered Professional Reporter and Notary Public for the State of Utah, do hereby certify that the foregoing is a true and correct transcript of proceedings in the above-entitled matter.
Dated at Salt Lake City, Utah, this 14th day of February, 1976.

BARBARA G. ANDERSEN, RPR,
Court Reporter.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

(Cr 75-116)

UNITED STATES OF AMERICA, *Plaintiff,*

v.

FRANK STEVE BRZOTICKY, *Defendant.*

SALT LAKE CITY, UTAH,
December 18, 1975.

Before: The Honorable Willis W. Ritter, Chief Judge.

TRANSCRIPT OF PROCEEDINGS

Appearances: For the United States: Michael Hunter, Assistant U.S. Attorney, 200 P.O. & Courthouse Building, Salt Lake City, Utah.
For the Defendant: John H. Allen, Attorney at Law, Kennecott Building, Salt Lake City, Utah.

DECEMBER 18, 1975.

The COURT. Next is Brzoticky. This is a unlawful transportation of firearms?
Mr. HUNTER. Yes, your Honor. This came from California. And the United States, at this time, is not ready. There are two witnesses in California and two witnesses in Colorado and two witnesses in Washington, D.C.
Mr. ALLEN. I am ready, your Honor.

The COURT. What is involved here? There is nothing involved in here to fool around with this matter.
Mr. ALLEN. I don't think so, your Honor. It is a claimed transportation of a .22 pistol across the state lines.
Mr. HUNTER. Your Honor, Mr. Brzoticky was residing with his girl friend and her brother-in-law in California, took the brother-in-law's gun, came to Utah and pawned the gun.
He pled nolo in the case in Colorado some time ago. And therefore he had a record. And that was the reason for pursuing the action.
Mr. ALLEN. The prior case——
The COURT. You are not ready?
Mr. HUNTER. No, your Honor.
The COURT. The case is dismissed.

* * * * * * *

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Dated at Salt Lake City, Utah, this 14th day of February, 1976.

BARBARA G. ANDERSEN, RPR.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

(Cr 75-122)

UNITED STATES OF AMERICA, *Plaintiff,*

v.

CRAIG WILLIAM MCLACHLAN, *Defendant.*

Salt Lake City, Utah, December 18, 1975.

Before: The Honorable Willis W. Ritter, Chief Judge.

TRANSCRIPT OF PROCEEDINGS

Appearances: For the United States: Michael Hunter, Assistant U.S. Attorney, 200 P.O. & Courthouse Building, Salt Lake City, Utah.
For the Defendant: Gilbert Athay, Attorney at Law, 321 South 6th East, Salt Lake City, Utah.

DECEMBER 18, 1975.

The COURT. McLachlan.
Mr. ATHAY. He is present, ready to proceed.
Mr. HUNTER. Your Honor, there are three witnesses in this. Christine, his ex-wife, is a key witness. She lives in Midway, Utah. We have been unable to serve a subpoena on her at this point. We have been unable to establish her whereabouts.
The COURT. This case is dismissed.

* * * * * * *

CERTIFICATE

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Dated at Salt Lake City, Utah, this 14th day of February, 1976.

BARBARA G. ANDERSON, RPR,
Court Reporter.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

(Cr 75-123)

(Cr 75-125)

UNITED STATES OF AMERICA, *Plaintiff*,

v.

KEVIN W. BARNEY AND JAMES SCOTT LIDDIARD, *Defendants*,

AND

UNITED STATES OF AMERICA, *Plaintiff*,

v.

LYNN D. LOSSEE, *Defendant*.

Salt Lake City, Utah, December 18, 1975.

Before: The Honorable Willis W. Ritter, Chief Judge.

TRANSCRIPT OF PROCEEDINGS

Appearances: For the United States: Steven Snarr, Assistant U.S. Attorney, 200 P.O. & Courthouse Building, Salt Lake City, Utah.

For the Defendants: Phil L. Hansen, Attorney at Law, 250 East Third South, Salt Lake City, Utah.

The COURT. Barney and Liddiard. This is Barney and Liddiard.

Mr. HANSEN. Yes, Barney and Liddiard.

The COURT. Arson in a national forest. All right. What is the status of this thing?

Mr. HANSEN. We are ready to go.

Mr. SNARR. Your Honor, I believe it has been consolidated with the matter of Lynn Lossee as indicated on the calendar. The government is still attempting to secure the presence of a witness from Reno and would anticipate being able to do so and proceed.

The COURT. You what?

Mr. SNARR. We are still attempting to secure the attendance of a witness from Reno, Nevada. We would anticipate he would be present at the time this matter would be reached.

The COURT. It is reached right now. Your anticipation at some time in the future is wrong.

Why are these consolidated?

Mr. HANSEN. Your Honor, they had separate preliminary hearings, your Honor. Mr. Lossess wasn't apprehended until after the preliminary hearing of Barney and Liddiard. All three were together.

We would move to dismiss because we are ready and the government isn't.

The COURT. Are you ready in either of those cases?

Mr. SNARR. As I stated, your Honor, we are ready with the exception that we have not secured the attendance of a witness from Reno who we feel is essential.

The COURT. It is just across the border.

Mr. SNARR. We anticipate that he will be able to drive here and be available for trial as early as Monday. We would like to select a jury and—

The COURT. Both cases are dismissed.

Mr. HANSEN. Thank you, your Honor.

* * * * * * *

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Dated at Salt Lake City, Utah, this 14th day of February, 1976.

BARBARA G. ANDERSON, RPR,
Court Reporter.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

(Cr 75-123)
(Cr 75-125)

UNITED STATES OF AMERICA, *Plaintiff*

v.

KEVIN W. BARNEY AND JAMES SCOTT LIDDIARD, *Defendants*,

AND

UNITED STATES OF AMERICA, *Plaintiff*,

v.

LYNN D. LOSSEE, *Defendant*.

SALT LAKE CITY, UTAH, *December 18, 1975*.

Before: The Honorable Willis W. Ritter, Chief Judge.

TRANSCRIPT OF PROCEEDINGS

Appearances: For the United States: Steven Snarr, Assistant U.S. Attorney, 200 P.O. & Courthouse Building, Salt Lake City, Utah.

For the Defendants: Phil L. Hansen, Attorney at Law, 250 East Third South, Salt Lake City, Utah.

DECEMBER 18, 1975.

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Mr. HANSEN. Yes, Barney and Liddiard.

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Mr. HANSEN. Thank you, your Honor.

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Dated at Salt Lake City, Utah, this 14th day of February, 1976.

BARBARA G. ANDERSEN, RPR,
Court Reporter.

78-678 O - 76 - 5

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JURY TRIALS BEFORE HONORABLE WILLIS RITTER

COMMENCING WEDNESDAY, JANUARY 14, 1976

10:00 A.M.

COUNSEL ARE INSTRUCTED TO KEEP IN TOUCH WITH THE CLERK AND WITH THE ATTORNEYS IN THE CASES THAT PRECEDE THEM. YOUR CASE WILL BE TRIED AS SOON AS THERE IS A DISPOSITION OF THE CASES AHEAD OF YOU. FREQUENTLY THE CASES ARE SETTLED RATHER THAN TRIED, AND THE RESPONSIBILITY TO KEEP INFORMED AND PREPARED TO GO TO TRIAL RESTS UPON COUNSEL

Cr 75-79 — United States of America — Rodney G. Snow

No. 1 — vs

Thomas Warner Hoopes — David J. Knowlton - ret.

(Willful failure to file income tax returns)

Cr 74-98 — United States of America — Max D. Wheeler

No. 2 — vs

David W. Clayton

(Willful failure to file tax returns)

HEARING: Defendant's motion to dismiss information
Defendant's motion to suppress evidence

C 6-72 — Walter E. Williams — W. Brent Wilcox; A. Wally Sandack

No. 3 — vs

Otis Elevator Company, corp. — Ray R. Christensen

vs

Christiansen Brothers, Inc. and W. W. Clyde and Company, joint ventures — Reed L. Martineau

(Damages - Personal Injury)

JURY TRIAL - Determination of Damages

C 74-105 — Elizabeth Pace and Joyanna White — John L. McCoy

No. 4 — vs

Hiroshi Tonoike — David K. Winder

(Personal Injury - Motor Vehicle)

C 74-140 — Carmen Kathleen McKell — Thomas R. Blonquist

No. 5 — vs

Melba Lynne Jarman — F. Robert Bayle

(Personal Injury - Motor Vehicle)

JURY TRIALS BEFORE HONORABLE WILLIS RITTER — PAGE 2

C 74-330 — Ray Wardle — James R. Black; Kenneth N. Kripke

No. 6 — vs

The Ute Indian Tribe, a Federal Chartered Corp.; Francis Wyasket; Homey J. Secakuku; Fred A. Conetah; Wilbur Cuch; Irene C. Cuch and Gary Poowegup, individually and as members of Uintah and Ouray Tribe Business Committee; and Michael A. Quinn, individually and as chairman of Ute Tribal Personnel Committee — Scott C. Pugsley

(Civil Rights)

C 74-342 — Pamela Marshall — S. Rex Lewis

No. 7 — vs

Frank Hildebrand — John H. Snow

(Personal Injury - Motor Vehicle)

C 74-382 — Jerald C. Atwood — Orrin G. Hatch

No. 8 — vs

Union Pacific Railroad Company — S. M. Matheson; Robert N. Weatherbee

(Violation of Federal Employers' Liability Act)

C 74-389 — Brenda McGuire Shuman — C. Jeffrey Thompson

No. 9 — vs

Iva Oliver (Koslowski) Hawkins and Herbert Koslowski — H. Wayne Wadsworth

(Personal Injury - Motor Vehicle)

C 74-394 — Ricardo A. Castro — Don E. Hammill

No. 10 — vs

Cerro De Pasco Corporation, subsidiary of Cerro Corporation — James B. Lee; Daniel M. Allred

(Breach of Contract)

C 74-397 — Gary D. Peterson and Thomas D. Peterson — John L. Black

No. 11 — vs

United States of America — Ramon Child

vs

Provo River Water Users Association, corp. — J. Dennis Frederick

(Wrongful Death)

JURY TRIAL CALENDAR BEFO[illegible] ORAL WILLIS RITTER — Page 3

C. 75-14	Robert Rees Dansie	John E. Shamberg; Don E. Hamill
No. 12	vs	
	Pioneer Gen-E-Motor Corporation, Illinois corporation	LeRoy S. Axland
	(Personal Injury - Lawn Mower Accident)	

Cr 74-54	United States of America	Ramon M. Child
No. 13	vs	
	J. Milton Rich	Donn E. Cassity
	(Bankruptcy Fraud)	

JURY ALREADY IMPANELED

MONDAY, FEBRUARY 2, 1976

Cr 75-76	United States of America	Ramon Child; Gary Spratling
No. 14	vs	
	Countryside Farms, Inc.; Egg Products Company; Olson Farms, Inc.; Snow White Egg Company; R. Kent Christofferson; Gilbert T. Cochran	Clifford L. Ashton & Ricardo Ferrari - Countryside Farms and Christofferson; Herschel Saperstein & Clark Sessions - Egg Products; Harold G. Christensen - Olso Farms & Cochran; Robert V. Brandt - Snow Whit
	(Conspiracy in Restraint of Interstate Trade and Commerce)	

[illegible] DISTRICT COURT
FOR THE
DISTRICT OF UTAH - CENTRAL DIVISION

RECEIVED
NOV 14 1975
UNITED STATES ATTORNEY UTAH

United States of America

v.

J. Milton Rich — No. CR 74-54

TAKE NOTICE that the above-entitled case has been set for CALL OF CALENDAR AND JURY TRIAL at Salt Lake City, on THURSDAY, NOVEMBER 20, 19 75, at 10:00 A.M. before Honorable Willis W. Ritter, P.O.& Courthouse Bldg., 350 South Main.

Date November 14, 19 75

[illegible] C. RITCHIE, Clerk,
By [signature], Deputy Clerk.

[illegible]on Child, U. S. Attorney, 200 P.O.& Courthouse Bldg., Salt Lake City, Utah
John E. Cassity, Esq., Kearns Bldg., Salt Lake City, Utah
J. Milton Rich, 6161 Sands Creek Court, Florissant, Missouri

Jack Smith -

EXHIBIT 9

JURY TRIALS BEFORE HONORABLE WILLIS W. RITTER

COMMENCING THURSDAY, NOVEMBER 20, 1975

10:00 A.M.

COUNSEL ARE INSTRUCTED TO KEEP IN TOUCH WITH THE CLERK AND WITH THE ATTORNEYS IN THE CASES THAT PRECEDE THEM. YOUR CASE WILL BE TRIED AS SOON AS THERE IS A DISPOSITION OF THE CASES AHEAD OF YOU. FREQUENTLY THE CASES ARE SETTLED RATHER THAN TRIED, AND THE RESPONSIBILITY TO KEEP INFORMED AND PREPARED TO GO TO TRIAL RESTS UPON COUNSEL.

C 274-70	Donald Boyd Julander and Jeff Julander, John Julander, Lorraine Ann Julander and Bruce Julander, minors, by their guardian Mary Vaughn Julander	Ken Chamberlain Clifford L. Ashton Scott Savage
No. 1	vs	
	Ford Motor Company, a corp.	Ray R. Christensen
	(Motor vehicle accident - death)	

C 194-73	William Taylor Newland, IV	James A. McIntyre
	vs	
	Robert Horton, Agent for Bureau of Narcotics and Dangerous Drugs and	Ramon M. Child Robert W. Adkins
No. 2	Ronald R. Robinson, Sheriff of Summit Co. Utah	
	(Damages - Violation 5th and 6th Amendments)	

C 210-73	Flying Diamond Corp., a corp.	Hardin A. Whitney
	vs	
No. 3	Dan Poland, John Sutherland, Craig Johnston Robert L. Latham, Orland Nielson, Thomas Sadley, Murray Payburn, William Sayer, American Stock Transfer Co., a corp., Jay Miller, Evelyn Mitchener, Transamerican Securities, Inc.,,a corp., Duane Jenson, John Badger aka J. J. Badger, Phillip K. Smith aka P. K. Smith aka Phyllis K. Smith, J. H. Smith aka Jack Smith, P Skeen, D. Todd, James Lamar, John Does 1 through 10 and Don Anderson	Richard Leedy Robert V. Phillips Glenn C. Hanni Richard C. Dibble Joseph McCarthy
	(Securities Exchange Act of 1934)	

Dec 1st -

C 74-66	United States of America	Ramon M. Child
	vs	
	80 Acres of Land, more or less, situated in San Juan County, Utah, Robert Byron Redd aka Robert D. Redd and Lynda Heidi Redd, his wife, et al., and unknown owners	Vernon B. Romney San Juan County Attorney Paul E. Reimann Robert S. Campbell, Jr.
No. 4		
	(Land Condemnation)	

C 74-109	Vern R. Webster, Robert B. Sheldon, Orson P. Nesler and Gordon McClean, individually and as representative members of a class	Curtis K. Oberhansley Dennis F. Olson Dan L. Berman
	vs	
No. 5	The Travelers Insurance Co., Equitable Life Insurance Society of the United States, Prudential Insurance Co. of America, Aetna Life and Casualty	Jonathan A. Dibble Stephen B. Nebeker Ricardo B. Ferrari, Harold G. Christensen
	(Clayton Act and the Sherman Act)	

No. 6	Larry G. McClellan (Violation of Fifth Amendment - Civil Rights)	Robert Van Sciver
C 74-140 No. 7	Carmen Kathleen McKell vs Melba Lynne Jarmin (Auto Collision - Injury)	Thomas R. Blonquist F. Robert Bayle
C 74-149 No. 8	Jerrold R. Morgan vs Verland T. Whipple (Breach of Contract)	William G. Gibbs Ralph R. Mabey
C 74-153 No. 9	Darwin L. Stone vs King-Seeley Thermos Co., Inc., a Delaware corp. (Breach of Warranty, Judgment for Personal Injuries)	Glen M. Richman Stephen B. Nebeker
C 74-166 No. 10	Colorado Well Service, a Colorado corp. vs Gulf Oil Corp., Go International, Inc., John Doe Insurance Co., or Companies and John Doe (Collection of Insurance for Damages)	William G. Gibbs Edward T. Wells Stephen B. Nebeker Richard H. Moffat John L. Young
C 74-192 No. 11	Cleon D. Tucker, Betty J. Tucker, his wife, Willard M. Tucker and Phillis O. Tucker, his wife vs Eugene S. Simpson, Mike Russell, Continental Account Servicing House, Inc., a Utah corp., and Key Account Collection House, Inc., a Utah corp. (Violation of Securities Exchange Act)	Arthur S. Nielsen David S. Cook Richard J. Leavy Richard B. Cuatto
C 74-257 No. 12	JoAnn Cook vs City of Price, Carbon County, Utah, Walter T. Axelgard, Mayor of the City of Price, Harold O. Patterick, Harold Mark Hanson, Toy Atwood, James Lee Jonson, Axel Denison as members of the City Council (Civil Rights)	Donn E. Cassity Michael T. McCoy Luke G. Pappas
C 74-272 No. 13	Frank E. and Delores Velarde, individually and on behalf of Richard Matthew Velarde, Dec'd vs City of Salt Lake, Glen N. Greener in his capacity as Public Safety Commissioner of the City of Salt Lake, J. Earl Jones, in his capacity as Chief of Police of the City of Salt Lake and Lorenzo Phillips, individually and in his capacity as an officer of Salt Lake City Police Dept. (Wrongful Death)	Stephen W. Cook Roger F. Cutler John T. Nielsen Harold G. Christensen

C 74-279 No. 14	John Hyde vs First Security Bank of Utah, N. A. (Breach of Warranty)	Hardin A. Whitney Jeffrey N. Clayton Jonathan A. Dibble
C 74-285 No. 15	Renee P. Schlosser vs Jeloo, Inc. (Civil Rights)	Stephen W. Cook Robert M. Yeates
C 74-311 No 16	Phyllis Frischknecht, by and through her Guardian ad Litem, Gail Frischknecht Hutchinson, and Gail Frischknecht Hutchinson individually vs Charles Ross (Personal Injury - Motor Vehicle)	H. Wayne Wadsworth F. Robert Bayle Wallace R. Lauchnor
C 74-317 No. 17	Clara M. Nell vs Freeman Decorating Co., a corp. (Personal injury - fall in defendant's display booth over electric cord)	M. Blaine Hofeling Verl R. Topham Anthony M. Thurber Timothy R. Hanson
C 74-319 No. 18	Clayton Haight and Kathie Haight vs Ether Joseph Christensen (Personal Injury - Motor Vehicle)	Orrin G. Hatch Glenn C. Hanni
C 74-328 No. 19	Grant L. Cavalli vs Union Pacific Railroad Company (Federal Employer's Liability Act - Negligence)	Orrin G. Hatch S. M. Matheson J. C. Williams
C 74-332 No. 20	David E. Martin vs Marjorie Holmes Madill, Administratrix of the Estate of Verl E. Madill, Deceased, and V. M. Madill Asphalt Paving Company (Personal Injury - Automobile Accident)	Donn E. Cassity Glenn C. Hanni
CR 75-41 No. 21	United States of America vs Carl D. Powers (Tax evasion and subscribing to false return - 3 counts)	Max D. Wheeler Sumner J. Hatch
CR 75-34 No. 22	United States of America vs Karl Stock Smith, David Leon Orlob (Conspiracy to submit false statements, false statements and aiding and abetting - 14 counts)	Rodney Snow Gilbert Athay
CR 74-54 No. 23	United States of America vs J. Milton Rich (Bankruptcy Fraud)	Ramon M. Child Donn E. Cassity

CENTRAL DIVISION

JURY TRIALS BEFORE HONORABLE WILLIS RITTER

COMMENCING TUESDAY, OCTOBER 21, 1975

10:00 A.M.

COUNSEL ARE INSTRUCTED TO KEEP IN TOUCH WITH THE CLERK AND WITH THE ATTORNEYS IN THE CASES THAT PRECEDE THEM. YOUR CASE WILL BE TRIED AS SOON AS THERE IS A DISPOSITION OF THE CASES AHEAD OF YOU. FREQUENTLY THE CASES ARE SETTLED RATHER THAN TRIED, AND THE RESPONSIBILITY TO KEEP INFORMED AND PREPARED TO GO TRIAL RESTS UPON COUNSEL.

CR 75-8	United States of America -vs- Steve Maycock & Eddie Bradshaw (Theft of Government Property) Count I on each ONLY.	Max D. Wheeler	Alvin I. Smith for Maycock & Bradshaw
No. 1			
CR 75-10	United States of America -vs- Rick O. Rasmussen (Illegal Entry on Military Reservation)	Max D. Wheeler	John Bucher
No. 2			
CR 75-20	United States of America -vs- Wayne Adams aka Swede Adams (Receipt of Stolen Property)	Max D. Wheeler	Matt Biljanic
No. 3			
CR 75-24	United States of America -vs- Richard Speir, Vernon Black and Gary Puffer (Theft of Government Property)	Max D. Wheeler	E. Craig Snow for Puffer & Spier Daniel E. England for Black
No. 4			
CR 75-26	United States of America -vs- Will Henry Savage, Jr. (Forging and Uttering United States Treasury Check)	Rodney G. Snow	Stanford S. Smith
No. 5			
CR 75-29	United States of America -vs- John Emil Hochmuller (Interstate Transportation and Disposal of Stolen Motor Vehicle)	Michael M. Hunter	David Bown
No. 6			
CR 75-30	United States of America -vs- Ronald Eldon Bench & Sally Anderson (Receipt of Stolen Property)	Max D. Wheeler	Dean R. Mitchell for Bench & Anderson
No. 7			
CR 75-32	United States of America -vs- John Emil Hochmuller (Interstate Transportation and Disposal of Stolen Motor Vehicle)	Michael M. Hunter	David Bown
No. 8			
CR 75-34	United States of America -vs- Karl Stock Smith & David Leon Orlob (Conspiracy to Submit False Statements, False Statements and Aiding and Abetting)	Rodney G. Snow	Dean R. Mitchell for Smith D. Gilbert Athay for Orlob
No. 9			

CR 75-37	United States of America -vs- Jay W. Simper, Terry Simper, Gary Simper, and Daniel Allen (Criminal Conspiracy to Defraud the U. S. and Theft of Timber from a National Forest)	Rodney G. Snow	E. Craig Snow for all Defs.
No. 10			
CR 75-36	United States of America -vs- James Bernard Fay, Jr., and Joseph John Tiernan (Conspiracy to Violate [Bank Robbery])	Steve Snow ~~Rodney G. Snow~~	P. Robert Knight for Tiernan George J. Romney for Fay
No. 11			
CR 75-39	United States of America -vs- Charles N. Pierson (Tax Evasion, Subscribing to a False Return Under Penalties of Perjury, and Aiding and Assisting in the Preparation of False Returns)	Max D. Wheeler	Clark W. Sessions
No. 12			
CR 75-40	United States of America -vs- Frank M. Whitney (Tax Evasion and Signing False Return Under Penalties of Perjury)	Max D. Wheeler Stipulated	J. Jay Bullock, E. Scott Savage and Gerald R. Miller
No. 13			
CR 75-41	United States of America -vs- Carl D. Powers (Tax Evasion and Subscribing to a False Return)	Max D. Wheeler	Sumner J. Hatch
No. 14			
CR 75-42	United States of America -vs- Irving S. Hutchinson (Receipt by a Felon of Firearm shipped in Interstate Commerce; Giving False Information in Acquisition of Firearm)	Max D. Wheeler	Sumner J. Hatch
No. 15			
CR 75-43	United States of America -vs- Elvin L. Booth & Donald G. Cox (Interstate Transportation in Furtherance of Scheme to Defraud) HEARING ON: Def. Booth's Motion for Bill of Particulars; Def. Booth's Motion for Severance and Separate Trial; and Def. Booth's Motion for Authorization to Obtain Trial Transcript	Max D. Wheeler Mike Hunter	D. Gilbert Athay for Cox Richard J. Leedy for Booth
No. 16			
CR 75-47	United States of America -vs- Kris Lynn Moore aka Christy Lynn Bright (Forgery, Uttering and Possession of Stolen Mail)	Michael M. Hunter Stipulated	Robert Stansfield
No. 17			
CR 75-51	United States of America -vs- Equity Oil Company (Unlawful Taking and Killing of Migratory Game Birds)	Rodney G. Snow	Frank Gustin
No. 18			

CR 75-62 No. 19	United States of America -vs- Glade Edward Jennings (Uttering Altered Government Obligations)	Max D. Wheeler Hunter R. Brent Stephens, Craig S. Cook
CR 75-64 No. 20	United States of America -vs- Ernest Rabbit Casey (Crime on Indian Country)	Max D. Wheeler Sam Brant H. Wall
CR 75-67 No. 21	United States of America -vs- Austin Brent Rackham (Counterfeiting)	Max D. Wheeler Gilbert Athay
CR 75-68 No. 22	United States of America -vs- L. Anthony Rodda (False Statement to Federally Insured Institution)	Max D. Wheeler Sam Thomas P. Vuyk Mike Hunter
CR 75-70 No. 23	United States of America -vs- John Martin Huffman (Theft of Government Property)	Max D. Wheeler Theodore I. Wittmayer
CR 75-72 No. 24	United States of America -vs- Gerald Mountainlion and Ronnie Appawoo (Crime on Indian Reservation — Assault with Dangerous Weapon)	Max D. Wheeler Sam W. Robert Wright for Mountainlion Charles C. Brown, for Appawoo
CR 75-82 No. 25	United States of America -vs- Vincent Sireech, Sr. (Crime on an Indian Reservation -- Incest)	Max D. Wheeler J. Rand Hirschi
CR 75-84 No. 26	United States of America -vs- Howard Daniel Nowmeyer, Jr. (Illegal Transfer of Destructive Devices)	Max D. Wheeler Sam Sanford Jorgenson
CR 75-88 No. 27	United States of America -vs- Scott Riley Straw (False, Fictitious or Fraudulent Claims)	Max D. Wheeler D. Gilbert Athay
CR 74-54 No. 28	United States of America -vs- J. Milton Rich (Bankruptcy Fraud)	Ramon M. Child Donn F. Cassity

CR 74-50 No. 29	United States of America -vs- Jay Victor Miller (Criminal Contempt)	Rodney G. Snow Sumner J. Hatch
CR 75-65 No. 30	United States of America -vs- Dwayne Nathan Hawkes (Theft of Government Property) COURT TRIAL	Max D. Wheeler Sam Joseph C. Foley

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE DISTRICT OF UTAH

JURY TRIAL CALENDAR BEFORE HONORABLE WILLIS ~~W. RITER~~ Mayken

CENTRAL DIVISION

COMMENCING MONDAY, NOVEMBER 4, 1974, at 10:00 A. M.

COUNSEL ARE INSTRUCTED TO KEEP IN TOUCH WITH THE CLERK AND WITH THE ATTORNEYS IN TH CASES THAT PRECEDE THEM. YOUR CASE WILL BE TRIED AS SOON AS THERE IS A DISPOSITION OF THE CASES AHEAD OF YOU. FREQUENTLY THE CASES ARE SETTLED RATHER THAN TRIED, AND THE RESPONSIBILITY TO KEEP INFORMED AND PREPARED TO GO TO TRIAL RESTS UPON COUNSEL.

Cr 74-14	United States of America	Rodney G. Snow
	vs	
FIRM SETTING Nov. 4	Tam Hailing	Sumner J. Hatch, ret.
	(Distribution of a Controlled Substance)	
No. 1		

C 74-33	James M. Butler	Anthony M. DeFino, Esq John L. Black, Esq.
	vs	Settled
FIRM SETTING Nov. 5	Ellen Clark and Linden Clark, and Herbert Michael Riley	Hanson & Garrett; Morgan, Melhuish, Monaghan, McCoid & Spielvogel
	Linden Clark Defendant & 3rd Party Plff.	
No. 2	vs	
	Pembroke Company	
	(Personal Injury - Motor Vehicle)	

Cr 74-19	United States of America	Rodney G. Snow
	vs	
FIRM SETTING Nov. 6	Corky Lennox, aka Dicky Lennox	David M. Bown, ret.
	(Enticement of a Female to Travel Interstate for Purposes of Prostitution)	
No. 3		

Cr 74-20	United States of America	Rodney G. Snow
	vs	
No. 4	Bobby Joe Moore	Phil L. Hansen, ret.
	(White Slave Traffic Act & Conspiracy)	

Cr 74-22	United States of America	Rodney G. Snow
	vs	
Nov. 8	William D. Bond	Phil L. Hansen, ret.
	(White Slave Traffic Act)	
No. 5		

EXHIBIT 11

C 74-143	Donald C. Johnson	Robert M. McRae, Esq. H. Wayne Wadsworth, E
FIRM SETTING Nov. 11	vs	
	Chevron Oil Company	Raymond M. Berry, Esq.
No. 6	(Personal Injury)	

Cr 74-24	United States of America	Rodney G. Snow
	vs	
Nov. 11	Reuben Arthur Scott	Phil L. Hansen, ret.
No. 7	(White Slave Traffic Act & Enticement)	

Cr 74-30	United States of America	Max Wheeler
	vs	
Nov. 11	Emil Clemons	Sumner J. Hatch, ret.
No. 8	(Internal Revenue Code)	

C 246-73	Dale Workman	Ray G. Martineau, Esq Richard W. Giauque, Es
	vs	
Nov. 18	Ontario Drive & Gear. Ltd.; Salsbury Corporation; Instrument Systems	Ray R. Christensen, Es Rex J. Hanson, Esq. H. Wayne Wadsworth, Es
No. 9	(Breach of Warranty causing personal injury to plaintiff)	Raymond Berry, Esq.

C 343-73	Walter Martinez, a minor by Willie Martinez; Joe Martinez, a minor, by Walter Martinez; Kathy Jones, a minor, by Donald L. Jones; Kenny Jones, a minor, by Donald L. Jones; Dennis Rinaldi, a minor, by Michael Rinaldi	David K. Robinson, Es Raymond S. Uno, Esq.
	vs	
No. 10	Boyd F. Gurney, Clarke N. Johnsen, Don Rowberry, Reed Russell, Billy Bunnell, Don Kirk, Owen Cluff, and John and Jane Does 1 to 65, and Board of Education of Tooele School District	Allan L. Larson, Esq.
	(Violation of First & Fourteenth Amendments - Civil Rights)	

Cr 74-48	United States of America	Rodney G. Snow
	vs	
	Karl S. Smith and Gerald Robert Ames	Sumner J. Hatch, ret. Dean R. Mitchell, ret
	(Conspiracy to Misapply Bank Funds and Misapplication of Bank Funds and Aiding and Abetting in Misapplication of Bank Funds)	
No. 11		

Cr 74-66	United States of America	Michael Hunter
	vs	
	Joseph Franklin Walker, Jr., aka Larry Brandon	John D. Russell, ret.
No. 12	(False Personation)	

C 190-73	K. Jay Holdsworth and Dona S. Holdsworth	Harold G. Christensen
Nov. 25	vs	
	Kline D. Strong	Clifford L. Ashton, E
No. 13	(Securities Exchange Act of 1934)	

C 139-70	Ervin H. Stolle, Cipriano G. Alba and Florian Lavoie	C.R. Henriksen, Esq. Edgar A. Brekke, Esq.
	vs	
	Arlandor Allen Jennings and Willard Pease Company, Inc.	Carman E. Kipp, Esq.
No. 14	(Damages - Personal Injury (Motor Vehicle))	

C 374-73	Everett E. Trees and Ruth E. Trees, a partnership, dba Trees Trailer Sales and Everett E. Trees & Ruth E. Trees	Brigham E. Roberts, E
Dec. 2	vs	
	Johnson Livestock Co., a corporation and Thomas Floyd Johnson	F. Robert Bayle, Esq.
No. 15	(Personal Injury - Motor Vehicle)	

C 206-73	Tommy Bruce Bond	Wayne G. Petty, Esq.
	vs	
	United States of America; Dept. of the Navy, & Capt. Frank C. Gilmore	C. Nelson Day Jackson Howard, Esq.
No. 16	(Breach of Contract)	

C 354-73	Randy F. Bishop	David E. West, Esq.
	vs	
	Joetta Marlene Ogea	Glenn C. Hanni, Esq.
No. 17	(Personal Injury - Motor Vehicle)	

C 377-73	Eugene Earl Buttery	Robert F. Orton, Esq. Allan R. Earl, Esq.
	vs	
	The Brianhead Corp., Brianhead Ltd., Charles E. Gunnoe & Burton Nichols, individually and as general partners of Brian Head Ltd; Joretta L. Gunnoe and Sally P. Nichols	Jay E. Jensen, Esq.
No. 18	(Personal Injury - Ski Accident)	

Cr 74-44	United States of America	Max Wheeler
	vs	
	Laura Marian Nichols	Roger D. Sandack, appt
No. 19	(Willful Failure to File Individual Income Tax Returns)	

Cr 74-50	United States of America	Rodney G. Snow
	vs	
	Jay Victor Miller	Sumner J. Hatch, ret.
No. 20	(Criminal Contempt)	

Cr 74-51	United States of America	Rodney G. Snow
	vs	
	John J. Badger, Jay Victor Miller, and Evelyn Mitchener	Sumner J. Hatch, ret. Richard Leedy, ret.
No. 21	(Fraudulent Sale of Securities; Sale of Unregistered Securities; Interstate Transportation of Falsely Made Stock Certificates; Interstate Transportation of Implements Used in Falsely Making Stock Certificates)	

C 74-161	Salt Lake Valley Innkeepers Assoc., Inc.	J. Thomas Greene, Esq Gifford W. Price, Esq
	vs	
Dec. 16	James Lynn, individually and as Secretary of Housing & Urban Development; Robert Rosenheim, Robert J. Matuschek, Salt Lake City Corp., Redevelopment Agency of Salt Lake City, Danny Wall, Salt Lake City Corrission as Redevelopment Agency, E. J. Garn, Conrad B. Harrison, Jennings J. Phillips, Jr., Stephen K. Harmsen, Glen Greener, Hartnett-Shaw Development Co., Inc.	B. Lloyd Poelman, Esq W. Robert Wright, Esq Greg R. Hawkins, Esq. John P. Pengel, Esq. Michael Hunter, Asst. U.S. Attorney
No. 22		

Cr 74-56	United States of America	Rodney G. Snow
Jan. 6, 1975	vs	
	Ned Millett Kofford	Bruce Coke, Esq.
No. 23	(Fraud by Wire)	

C 363-72	Jane Doe	Richard I. Aaron, Esq Mary Lou Cooke, Esq.
	vs	
	Evan E. Jones, Jr., Richard P. Lindsay, Douglas E. Johnson, Gerald Burnett, Harry A. Alexander, L. R. Boylance, Geraldine Atkinson, Sharron N. Bevan, Paul M. Christopherson, Glen E. Vernon, Bernie L. Heiling, Marilyn Peterson and Floy Taylor	Vernon B. Romney
No. 24	(Violation of Civil Rights Under Public Welfare Division of Family Services)	

C 118-73	J. Eugene Robinson & Alice R. Stephens	David K. Watkiss, Esq
	vs	
	Kenyon D. Robinson, Leon D. Robinson and Thomas D. Robinson	David E. West, Esq.
No. 25	(Imposition of Constructive Trusts)	

C 74-51	Wilma Nielson	Richard Glauque, Esq. Tex R. Olsen, Esq. Clifford L. Ashton, Es
	vs	Chris Wangsgard, Esq.
	Safeway Stores, Inc.	Stephen B. Nebeker, Es
No. 26	(Personal Injury - Judgment)	

Cr 74-53	United States of America	Rodney G. Snow
	vs	
	Richard T. Cardall, Frank L. Parks, William Allen, International Chemical Development Corporation, and Golden Rule Associates	James A. McIntosh, Esq Wallace R. Pennett, Es Dean R. Mitchell, Esq Lowell Hawks, Esq.
No. 27	(Conspiracy; Fraudulent Sale of Stock; Sale of Unregistered Stock)	

Cr 74-76	United States of America	Rodney G. Snow
	vs	
	Wallace Murphy Plum, aka Porky Plum	David Bown, Esq.
No. 28	(Receipt in ICC of Stolen Silver)	

Cr 74-11	United States of America	Rodney G. Snow
	vs	
	David Atchley, aka Donald R. Decker	Phil L. Hansen, ret.
No. 29	(Theft from Interstate Shipment)	

Cr 74-43	United States of America	Rodney G. Snow
	vs	
	Grover Adelbert Sponable	Jerome Mooney, Esq.
No. 30	(Theft of Baggage From an Interstate Shipment)	

Cr 74-54	United States of America	Rodney G. Snow
	vs	
	John W. Rich, J. Milton Rich, William D. Rich	Donn E. Cassity, Esq.
No. 31	(Bankruptcy Fraud)	

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE DISTRICT OF UTAH

CRIMINAL JURY TRIAL CALENDAR BEFORE HONORABLE WILLIS W. RITTER

CENTRAL DIVISION

COMMENCING TUESDAY, MAY 28, 1974

10:00 A.M.

MAY 21 1974

U.S. DISTRICT COURT, UTAH

COUNSEL ARE INSTRUCTED TO KEEP IN TOUCH WITH THE CLERK AND WITH THE ATTORNEYS IN THE CASES THAT PRECEDE THEM. YOUR CASE WILL BE TRIED AS SOON AS THERE IS A DISPOSITION OF THE CASES AHEAD OF YOU. FREQUENTLY THE CASES ARE SETTLED RATHER THAN TRIED, AND THE RESPONSIBILITY TO KEEP INFORMED AND PREPARED TO GO TO TRIAL RESTS UPON COUNSEL.

Cr 74-1	United States of America	Rodney Snow
5.28	vs	
No. 1	Sheldon Giles	David A. Robinson, ret.
	(False & Fraudulent Withholding Statement)	

Cr 74-11	United States of America	Rodney Snow
5.28	vs	
No. 2	David Atchley, aka Donald R. Decker	Phil L. Hansen, ret.
	(Theft from Interstate Shipment)	

Cr 74-12	United States of America	Rodney Snow
5.28	vs	
No. 3	Jack Vanekolenburg	John D. O'Connell, ret.
	(Distribution of a Controlled Substance)	

Cr 74-13	United States of America	Rodney Snow
5.28	vs	
No. 4	Rand Spencer Necham	John D. O'Connell, ret.
	(Distribution of a Controlled Substance)	

EXHIBIT 12

Cr 74-14 United States of America — Rodney Snow

5 5-28 vs

No. 5 Tam Halling — Sumner J. Hatch, ret.

(Distribution of a Controlled Substance)

Cr 74-16 United States of America — Rodney Snow

5 5-29 vs

No. 6 Mack Harris Thompson — Robert Van Sciver, ret.

(White Slave Traffic Act)

Cr 74-20 United States of America — Rodney Snow

5 6-29 vs

No. 7 Bobby Joe Moore and William Noies Saunders — Phil L. Hansen, ret.

(White Slave Traffic Act & Conspiracy)

Cr 74-22 United States of America — Rodney Snow

5-29 vs

No. 8 William D. Bond — Phil L. Hansen, ret.

(White Slave Traffic Act)

Cr 74-23 United States of America — Rodney Snow

5 5-29 vs

No. 9 Ed Brown — Lambertus Jansen, ret.

(Procurement of Airline Tickets & Transportation for Purposes of Interstate Travel & Prostitution; & Enticement of a Female to Travel Interstate for Purposes of Prostitution)

Cr 74-24 United States of America — Rodney Snow

vs

No. 10 Reuben Arthur Scott — Phil L. Hansen, ret.

(White Slave Traffic Act & Enticement of a Female)

Cr 74-25 United States of America — Rodney Snow

6-30 vs

No. 11 Clarence Earl Bradley — Galen Ross, ret.

(White Slave Traffic Act)

Cr 74-26 United States of America — Rodney Snow

6 3 vs

No. 12 Melvin Kay Meads — Thomas P. Vuyk, ret.

(Unlawful Possession of Unregistered Firearms)

Cr 74-27 United States of America — Rodney Snow

6 3 vs

No. 13 John Earl Worthen — Galen Ross, ret.

(Interstate Transportation of Stolen Securities; and False Statement to Government Agency)

Cr 74-28 United States of America — Rodney Snow

6 5 vs

No. 14 Orin Vern Allen and Edwin L. Allen — Phil L. Hansen, ret.

(Theft of Mail)

Cr 74-29 United States of America — Rodney Snow

6 5 vs

No. 15 Norvin Tod Tripple, Richard Bryan Holladay, and Richard Eldon Dohse — Thomas R. Blonquist, ret; Kenneth Rothey, ret.; Keith Diesinger, ret.

(Receiving Stolen Property Transported in Interstate Commerce)

Cr 74-30 United States of America — Rodney Snow

vs

No. 16 Emil Clemons, Jr. — Sumner J. Hatch, ret.

(Internal Revenue Code)

Cr 74-33	United States of America	Rodney Snow
	vs	
No. 17	Rex E. Feustal and David V. Pack	Robert Van Sciver, ret.
	(Taking More Migratory Birds Than Allowed)	
Cr 74-36	United States of America	Rodney Snow
	vs	
No. 18	Carmelo Santiago Cruz	Phil L. Hansen, ret.
	(Distribution of a Controlled Substance)	
Cr 74-43	United States of America	Rodney Snow
	vs	
No. 19	Grover Adelbert Sponable	Jerome Mooney, ret.
	(Theft of Baggage from an Interstate Carrier)	

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH—CENTRAL DIVISION

UNITED STATES OF AMERICA v. WILL HENRY SAVAGE, JR.

No. CR 75-26

Take notice that the above-entitled case has been set for Jury trial at Salt Lake City, Commencing: on Tuesday, October 21, 1975, at 10:00 A.M. before Honorable Willis W. Ritter, 250 U.S. Post Office & Courthouse Building.

Date: October 20, 1975.

VERL C. RITCHIE,
Clerk.

To: Rodney G. Snow, Asst. U.S. Attorney, 200 U.S. Post Office & Courthouse Building, Salt Lake City, Utah 84101.

Stanford S. Smith, Esq., 225 South 200 East, Salt Lake City, Utah 84111.

Will Henry Savage, Jr., 429 Sego, Salt Lake City, Utah 84111.

To the Defendant: By Order of Chief Judge Willis W. Ritter, the defendant is directed to appear at the Office of the U.S. Marshal, Room 244, U.S. Courthouse, Salt Lake City, one-half hour prior to the time listed for court appearance.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, VS. WILL HENRY SAVAGE, JR., DEFENDANT

CR-75-26—Motion for Continuance on the Grounds That Witnesses Have Not Been Secured

Comes now Rodney G. Snow, Assistant United States Attorney, for and on behalf of the United States of America, and hereby moves this honorable Court for a continuance in the above entitled case, and for good cause shows the Court as follows:

1. The United States did not receive notice of the Court's current trial calendar, including the trial setting for the above referenced case, until the afternoon of October 20, 1975.

2. At approximately 3:00 P.M. on October 20, 1975, the United States Marshal for the District of Utah had in their hands the Subpoenas for witnesses in the above referenced case.

3. Thus far the United States Marshal for the District of Utah has been unable to locate two witnesses in the case, including one very crucial witness. The crucial witness is Mr. Henry Allen, who was the payee of the Treasurer's check which is the subject of this lawsuit.

4. The Marshal's office has worked diligently in an effort to locate Mr. Allen and thus far has been unable to do so.

Therefore, the Government respectfully requests that the trial setting of the above referenced case be continued.

DATED this 21st day of October, 1975.

RAMON M. CHILD,
United States Attorney.
RODNEY G. SNOW,
Assistant United States Attorney.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, VS. WILL HENRY SAVAGE, JR., DEFENDANT

CR-75-26—Order of Dismissal

Came on for trial on October 22, 1975, the defendant being present and represented by counsel, Stanford S. Smith, Esq., and the defendant being ready for trial, and the Government being represented by Assistant United States Attorney Rodney G. Snow, and the Government not being ready for trial in view of the fact that it had been unable to locate a crucial witness; now, therefore,

IT IS HEREBY ORDERED that the above referenced case is dismissed.

DATED this 31st day of October, 1975.

WILLIS W. RITTER,
Chief Judge, United States District Court.

CASES WHERE DEFENDANT HAS BEEN ARRESTED BUT NO INFORMATION OR INDICTMENT FILED AS OF MAY 10, 1976

Case no.	Number of defendants	Arrest date	Days since arrest
75-0207	1	Jan. 5, 1976	136
75-0278	2	Dec. 22, 1975	150
76-0023	1	Jan. 30, 1976	101
76-0025	1	Feb. 11, 1976	89
76-0027	8	Jan. 30, 1976	101
76-0030	1	Mar. 30, 1976	41
76-0038	1	Apr. 14, 1976	26
75-0162	1	Jan. 22, 1976	109
76-0001	1	Jan. 8, 1976	133
76-0022	1	Mar. 25, 1976	46

CASES WHERE DEFENDANT HAS BEEN SERVED WITH SUMMONS BUT NO INFORMATION OR INDICTMENT FILED AS OF MAY 10, 1976

Case no.	Number of defendants	Date summons served	Days since service
75-0269	1	Dec. 16, 1975	146
76-0024	1	Feb. 10, 1976	90
76-0033	1	Feb. 12, 1976	88
76-0039	1	Feb. 14, 1976	86
76-0041	1	Feb. 12, 1976	92

CASES WHERE INFORMATION OR INDICTMENT FILED BUT NO ARRAIGNMENT HELD AS OF MAY 10, 1976

Case no.	Number of defendants	Information or indictment filed	Days since filing
CR-75-132	1	Dec. 4, 1975 (indictment)	158
CR-76-1	2	Jan. 13, 1975 (misleading information)	128
CR-76-10	1	Jan. 27, 1976 (misleading information)	114
CR-76-12	1	Feb. 9, 1976 (misleading formation)	91
CR-76-13	1	Feb. 23 1976 (misleading information)	77
CR-76-14	2	Feb. 20 1976 (misleading information)	80
CR-76-15	2	Feb. 23, 1976 (misleading information)	77
CR-76-16	1	do	77
CR-76-17	1	Feb. 4, 1976 (indictment-rule 20)	96
CR-76-18	1	Feb. 27, 1976 (misleading information)	73
CR-76-19	1	Mar. 15, 1976 (misleading information)	56
CR-76-20	1	Mar. 17, 1976 (petty office information)	54
CR-76-23	3	Apr. 7, 1976 (petty office information)	33
CR-76-24	3	do	33
CR-76-25	1	Apr. 14, 1976 (misleading information)	26
CR-76-26	1	do	26

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CR 75-72

UNITED STATES OF AMERICA vs. GERALD MOUNTAINLION AND RONNIE APPAWOO, DEFENDANTS.

SALT LAKE CITY, UTAH,
November 7, 1975.

Before: The Honorable WILLIS W. RITTER, Chief Judge.

Steve Snarr, Esq., Assistant United States Attorney, appearing on behalf of the United States.

W. Robert Wright, Esq., appearing for the defendant Mountainlion.

Charles C. Brown, Esq., appearing for the defendant Appawoo.

MOTION FOR DISMISSAL

The COURT. All right, now, Mr. Wright, what do you want to talk about?

Mr. WRIGHT. Your Honor, I have been appointed to defend a defendant by the name of Gerald Mountainlion in another case, which is No. 24 on your calendar. He is charged with aggravated assault, the same charge that was made against the defendant, Mr. Casey, in a case just heard by the Court. We have made the same motion upon the same grounds that have been made by Mr. Brandt Wall, and we move the Court for dismissal on the grounds that are set forth in our motion and our memorandum, these being that the statute upon which Mr. Mountainlion is charged is unconstitutional in that it unlawfully discriminates against him as an Indian.

The COURT. You are not representing your client very good. You are overlooking something that a practical man ought to think about. The defendant in the preceding case was in jeopardy.

Mr. WRIGHT. I recognize that.

The COURT. He was confronting a jury. Now you are pushing your luck here. If I rule on this motion before you confront a jury and that constitutional question is litigated for the next ten years and goes up to the Supreme Court of the United States and in the meantime the Government amends, you have done your client a very great disservice, because there is no bar to him being prosecuted.

Mr. WRIGHT. Well, that is a possibility, Your Honor.

The COURT. It is not only a possibility. That is what will happen. Now, I have been trying to handle all these cases on this calendar by having a jury in the box there and not listening to your arguments about anything. You push in here now at a time when the motion isn't even set down for argument, and you have got your client in a fix where he may be twice tried for this thing. Now, that is poor legal representation from my point of view, and I am going to do what I can to protect him against his counsel, and we will just keep that right where it is and get a jury for you one of these days, and when we get the matter up before the jury we will get far enough down the way with the evidence to see

what is involved and then we will entertain your motion. I don't want to be trying these cases again. I am interested in the court docket as much as I am the Indian boy, but he ought to have the benefit of double jeopardy defense. If he is prosecuted once that ought to be enough. That will be all.

CERTIFICATE

This is to certify that the foregoing is the official transcript of the arguments of counsel and ruling of the Court on the motion for dismissal in the above-entitled cause, and that the same is a true and accurate transcript.

LEROY WALKER.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, V. RICK O. RASMUSSEN, DEFENDANT

CR 75-10—Plea

SALT LAKE CITY, UTAH, *March 24, 1975.*

Before. The Honorable Willis W. Ritter, Chief Judge.

Max D. Wheeler, appearing on behalf of the plaintiff. The defendant appeared without counsel.

Mr. WHEELER. This is a petty offense, your Honor. It's illegal entrance on military reservation. Apparently his attorney is not here.

The COURT. Do you have an attorney?

The WITNESS. I have a lawyer. He didn't think it was necessary to come.

The COURT. If you have an attorney we will have to have him here. What kind of petty offense was it? We don't entertain those petty offenses up there on the reservation. How did that one get in here?

Mr. WHEELER. The defendant in this case was found on the military reservation in possession of a controlled substance. He was issued a bar letter, as they call it, barring him from further entry on the reservation. Subsequent to the issuance of that letter, he did enter.

The COURT. What's the controlled substance got to do with it?

Mr. WHEELER. That initiated his bar from the reservation, your Honor. This happened some time ago, before I came in.

The COURT. I don't think this case will last very quick. I think it will go out the door with wheels under it. I can't take your plea here without your attorney. Is he coming or what?

The DEFENDANT. No. He didn't feel it was necessary for him to come. He wanted me to come and plead and set a trial date.

The COURT. Tell him I send my regards. Tell him to get down here. You go down and take a seat. Get hold of that attorney.

John Bucher appeared on behalf of the defendant.

The COURT. This is a petty offense. Are you ready to plead?

The DEFENDANT. Yes, your Honor.

The CLERK. How do you plead to the information, guilty or not guilty?

The DEFENDANT. Not guilty.

The COURT. Good. That's what you should do. There's a question whether I'm going to handle it or not. I may throw it out. I don't take these petty offenses, you see. The military up there ought to run that reservation. They ought to run it. And when they find out they can't run it, at that point, particularly with respect to traffic offenses, they can't manage the traffic up there, so they want me to be a traffic policeman, traffic examiner, and dish out dollar-and-a-half fines, that sort of business. I'm not going to do it. It looks to me like this thing ought not to be here.

Mr. SNOW. I felt, your Honor, that the petty offense justified the Court's attention under the circumstances.

The Court. The plea is not guilty. That's a proper plea in this case, and we'll look at your cards when we get it on the calendar, and I think chances are that you won't have a big enough hand to stay in the game.

Mr. Bucher. Thank you.

CERTIFICATE

I, Janice Mitsunaga, CSR, do hereby certify that the foregoing is a true and correct transcript of proceedings in the above-entitled matter.

Dated at Salt Lake City, Utah, this 8th day of May, 1975.

JANICE MITSUNAGA, *CSR.*

CRIMINAL DOCKET, UNITED STATES DISTRICT COURT

CR 75-10

THE UNITED STATES VS. RICK O. RASMUSSEN

ATTORNEYS

For U.S.: Max D. Wheeler, Asst. U.S. Atty., 200 U.S. Post Office & Courthouse, Salt Lake City, Utah 84101

For Defendant: John Bucher, Esq. (ret.), Suite 271 Cottonwood Mall, 4835 Highland Drive, Holladay, Utah 84117

PROCEEDINGS

Petty Offense Information, filed. Summons issued.

Notice of Arraignment on 2/7/75 at 10:00 A.M. mailed.

Marshal's return showing service of Summons on 1/31/75, filed.

Notice mailed vacating this matter off of the Rule Day Calendar for 2/7/75.

Notice mailed of Arraignment on Monday, March 24, 1975 at 10:00 A.M.

Came on for arraignment. Def. entered a plea of not guilty. This case set on trial calendar.

Transcript of Plea, March 24, 1975, filed.

Notice mailed of Jury Trial commencing 10/21/75 at 10:00 A.M.

Came on for calling of jury trial calendar on 10/21/75. Mr. Bucher, on behalf of his client waived jury trial in this matter. Motion granted. This matter tried to the court on 10/21/75. Evidence taken. After completion of the plaintiff's case, defendant moved for judgment of dismissal and acquittal. Court granted the dismissal of the action.

The cases wherein the defendants refused to waive indictment are:

United States v. *Aiono*, Mag. No. A-75-97.

United States v. *Huffman*, Mag. No. A-75-176.

United States v. *Larsen*, Mag. No. A-75-187.

United States v. *Manzanares*, Mag. No. A-75-202.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

MOTION FOR EMPANELING OF A GRAND JURY

Ramon M. Child, United States Attorney for the District of Utah, respectfully requests this Honorable Court that a grand jury be summoned to serve within the Central Division of the United State District Court for the District of Utah, commencing February 5, 1976; this Motion and Request is made upon the ground and for the reason that the public interest requires consideration by a grand jury of matters pending in the office of the United States Attorney, including the current necessity of investigating Federal offenses within the District, the need for presentation of matters concerning persons who have recently refused to waive indictment, and investigation of certain matters concerning the Antitrust Division of the Department of Justice with regard to alleged violations of the Antitrust laws of the United States within the Central Division of the Federal Court for the District of Utah.

This Motion is brought pursuant to the provisions of Rule 6 of the Federal Rules of Criminal Procedure.

Respectfully submitted this 23rd day of January, 1976.

RAMON M. CHILD,
United States Attorney, District of Utah.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ORDER IN RE GRAND JURY EMPANELED FEBRUARY 10, 1975

Upon the advice of the United States Attorney that all matters originally set for presentation to the above Grand Jury have been presented and have resulted in return of Indictments, with certain exceptions hereafter particularly described.

It Is Hereby Ordered that the matters hereafter presented to the Grand Jury empanelled in the Central Division, District of Utah, on February 10, 1975, shall be limited exclusively to the following subject-matter, some portions of which the Grand Jury has already commenced investigating:

1. That certain investigation of antitrust violations, consisting of price fixing and other anticompetitive conduct in the egg industry in the District of Utah, which has been the subject of ten days of proceedings before the Grand Jury to this date.

2. Those certain investigations of antitrust violations, consisting of price fixing and other anticompetitive conduct, in the grocery and beef industries in the District of Utah, with respect to which an initial group of subpoenas have heretofore been issued and initial production of documents has to date supplied more than 200,000 documents.

3. That certain investigation of fraud in the acquisition of approximately eight million dollars of Small Business Administration funds for the use of, or transmitted through, a certain Small Business Investment Company, with respect to which an initial group of seventy-three subpoenas duces tecum have heretofore been issued and in response to which more than two thousand documents have been produced to date.

4. That certain investigation of fraud in the acquisition of moneys from the Veterans Administration by a local corporation offering certain correspondence courses and classes for Veterans, with respect to which an initial group of subpoenas has been issued and at least three full days of testimony heard by the Grand Jury.

5. Presentation of evidence for indictment of those persons who, while the Grand Jury is empanelled, refuse to waive indictment.

Dated this 25th day of April, 1975.

By The Court:

WILLIS W. RITTER,
Chief Judge, United States District Court, District of Utah.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

REQUEST THAT GRAND JURY BE ALLOWED TO REMAIN IN SESSION, AND THAT THE COURT'S ORDER OF APRIL 25, 1975, LIMITING THE MATTERS WHICH MAY BE PRESENTED TO THE GRAND JURY BE QUASHED

Comes now Ramon M. Child, United States Attorney for the District of Utah, and respectfully requests this Honorable Court to permit the Grand Jury empanelled on February 10, 1975 to continue to sit, and to conclude matters now pending before it.

It is also respectfully requested that this Court's Order of April 25, 1975, which limits the matters which the United States Attorney's Office may present to the Grand Jury be vacated in order that the United States Attorney's Office may present other matters to the Grand Jury which the public interest requires the Grand Jury to consider.

Dated this 4th day of December, 1975.

RAMON M. CHILD,
United States Attorney.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BEFORE: THE HONORABLE WILLIS W. RITTER, CHIEF JUDGE

Report of the Grand Jury, Thursday, December 4, 1975, Salt Lake City, Utah.

For the Government: Ramon M. Child, United States Attorney, 200 U.S. Courthouse, Salt Lake City, Utah 84101.

Podney G. Snow, Assistant U.S. Attorney.

For the Grand Jury: Lund, Foreman.

SALT LAKE CITY, UTAH, THURSDAY, DECEMBER 4, 1975, 2:20 P.M.

The COURT. I assume this grand jury has a report.
Mr. SNOW. They do have a report, your Honor.
The COURT. Come up here.
Mr. CHILD. May I approach the bench?
The COURT. Yes.
(Unreported bench conference between Court and counsel.)
The COURT. I understand you have a report, Mr. Foreman.
The FOREMAN. Yes, I do, your Honor.
The COURT. All right. Would you read it.
The FOREMAN. "We, the grand jurors duly impaneled, sworn, and charged in said court on the 10th day of February 1975, respectfully report as follows:
"That the Grand Jury has been in session since February 10, 1975, and at each and every session thereof there have been in attendance all of the grand jurors so impaneled and sworn, with the following exceptions, excused from attendance as indicated on the report.
"That at each and every session thereof there have not been less than 16 members in actual attendance.
"That we have considered 5 alleged violations of the statutes of the United States; that we have found 4 true bills, which are returned herewith into court, properly endorsed by the Foreman of the Grand Jury; and that we have declined to return indictments on zero cases presented.
"In addition, the Grand Jury is currently considering other matters presented by the United States Attorney, but is not ready to report on them at the present time, it being the intention of the Grand Jury that as soon as the other matters have been presented in full the Grand Jury will make a further report to the Court."
The COURT. Well, the district attorney got his oar in on that one, didn't he.
Mr. CHILD. I think not, your Honor.
The COURT. You mean you didn't draw that document?
Mr. CHILD. I didn't draw it. Mr. Snow has been attending the Grand Jury.
Mr. SNOW. That's the standard form we've always used, your Honor.
Mr. CHILD. It's probably the same language as the last report the jury did.
The COURT. I don't think so, but it doesn't make any difference now.
Thank you very much. Is there any——
Mr. CHILD. Your Honor, I have the 4 indictments that were returned by the Grand Jury, and I move that they be received by the Clerk.
The COURT. All right. They may be filed. And I suppose you want warrants issued, do you, or not?
Mr. CHILD. Yes, your Honor. We want summonses issued on 3 of them.
Mr. SNOW. They're all summonses, your Honor. We request summonses.
The COURT. Summonses will issue. And there are no secret indictments, I suppose?
Mr. CHILD. There are not.
The COURT. Is there bail recommended?
Mr. SNOW. No bail has been recommended.
The COURT. All right. Then you report to the Clerk and take your seat; and I'll say a few things to the Grand Jury.
You have been serving this Court since last February, as your foreman just told me, and you have served us well, and this is much longer than I ordinarily keep a Grand Jury. I was persuaded to keep you folks longer because of matters that the Government wanted to present.
Now, some of those matters have not yet been presented; and on at least one there has been some testimony before you which has not been completed that the Government told me they would complete by December, and they have failed to complete that They have carried on no investigations for several months, as a matter of fact.
And so I think we should discharge the Grand Jury; and I hereby do so, and I do it with the thanks of the Court, and I'll say to you that you have served us real well; and I have the honor and the position that I occupy here of representing the people of the United States of America, and I want to thank you for your assistance in the administration of justice on the criminal side of this court.
Drive carefully on your way home. This is the end of your service. Go to the Clerk's Office when you leave the courtroom, and be sure to give the clerks the information necessary, so they can get your pay voucher to you. You're excused.

The FOREMAN. Could I take a moment of your time, please?
The COURT. Sure.
The FOREMAN. The Grand Jury would like to thank you for the opportunity that we have had of serving as federal grand jurors in representing the people of the United States of America; but we are deeply concerned, and we have been for some time about the fact of unfinished business.
We haven't felt it a hardship, you know, to meet and to act in this capacity; and we would like to at this time, with your permission, to complete the investigations that we still haven't completed.
The COURT. Well, I think I'm acquainted with that, and I've already alluded to it.
So we will do as I say.
You're discharged. Go to the Clerk's Office.
I, Ronald F. Hubbard, official reporter in the U.S. District Court, do hereby certify the preceding transcript to be true and correct, set forth this 27th day of February 1976, at Salt Lake City, Utah.

RONALD F. HUBBARD.

JANUARY 23, 1974.

Hon. WILLIS W. RITTER,
Chief Judge, United States District Court.

C. NELSON DAY,
United States Attorney.

Cases which need to be presented to a Grand Jury and cases which merit Grand Jury investigation.
In response to your request, find attached a list of cases which this office needs to present to a Grand Jury. Hopefully the list is complete; however, there may be other cases presented to this office by the various investigative agencies which will need Grand Jury attention.
We feel that many of the cases on the attached list merit a thorough Grand Jury investigation, and in the White Slave Act cases we need to make firm the testimony of the various victims. Several of these victims have been beaten and threatened.
The stock fraud cases are complicated and involved and will take some time to untangle. Some of the potential defendants listed may be innocent of any wrong doing and consequently will not be indicted. However, each stock fraud case needs to be thoroughly investigated.
In view of the complexity of the matters to be presented to the Grand Jury, we would appreciate having the Grand Jury sit at a different time than the trial of the criminal cases now pending and on your present calendar. If the present criminal jury trial calendar is to follow the present civil jury calendar, as we understand it will, may we suggest that the Grand Jury be convened in the next two or three weeks in order that we may present these cases to the Grand Jury while the civil calendar is in process. Due to the difficulties in locating witnesses and getting them here, we will need at least two weeks' notice, prior to commencement of the Grand Jury proceedings.
Your attention and consideration is very much appreciated.

Senator BURDICK. Just a minute. I have a question or two. Mr. Child, much of your testimony, particularly at the point where I interrupted and thereafter, deals with the activities or the actions of Judge Ritter as a trial judge. And you understand that this subcommittee would have no authority to do anything about his actions as a trial judge. We're dealing only with his action or conduct as the judge in charge of—as the chief judge.
And I think the statute involved here only applies to chief judges. Do you understand that, Mr. Child?
Mr. CHILD. I do.
Senator BURDICK. And the misconduct, if any, as a sitting trial judge, would not be within the jurisdiction of this Committee.
Mr. CHILD. This is correct. May I respond?

Senator BURDICK. Now, you first referred to the fact that you had difficulty in setting calendars and so forth, but I want to call your attention to title 28, section 332, subparagraph (d): "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

Apparently he has had some problems about the trial date in criminal cases. Except for appeals in individual cases and except for applications for extraordinary writs, have you asked the judicial council of the 10th circuit for orders regulating the setting of criminal cases for a trial under the section I just read, section 332?

Mr. CHILD. No; we have not.

Senator BURDICK. If S. 1130 were enacted—that's the bill before us—the word "Chief" would be eliminated from Judge Ritter's title and if we were to eliminate that, would your problems in the central district be solved?

Mr. CHILD. They would not be 100 percent solved, but it would be 75 percent solved.

Senator BURDICK. It wouldn't solve those cases where he acted as a trial judge; would it?

Mr. CHILD. No; those cases that were actually in his court for trial, it would not solve. However, it would solve the situation of the grand juries; it would solve the situation of the magistrates; it would solve the situation of the trailing calendars without notice because rules could be adopted.

He refuses to adopt rules and in a two-man district, it's impossible for the associate judge to stand against that. The associate judge himself doesn't publish rules, but he abides by certain written rules that were adopted by a predecessor.

Senator BURDICK. And that's why this committee would like to confine ourselves to those areas that have particular application to the bill before us.

Mr. CHILD. Yes.

Senator BURDICK. The matters relating to the convening and functioning of a grand jury in the central division of Utah are involved in the mandamus proceedings commenced on April 21 of this year in the Court of Appeals of the 10th Circuit.

As a result of that action, a grand jury was empaneled on May 10 and the court of appeals has retained jurisdiction over the mandamus proceedings pending further developments. Is this correct?

Mr. CHILD. This is.

Senator BURDICK. And is that matter now pending?

Mr. CHILD. It is. And Judge Ritter has empaneled that grand jury and empaneling that grand jury he gave them a charge which cut the ground out from under them and told them that they were archaic and evil and that, in truth and in fact, that the United States and the country of Nigeria are the only countries in the world that still hang on to the grand jury system, that it is a bad system, and that the real system ought to be allowing trial judges to listen to these matters and they have better expertise and experience to decide whether a crime has been committed and the grand jury should be abolished.

And I then took the grand jury into the grand jury room and you can imagine that they wondered why they were meeting.

Senator BURDICK. My point is that the Circuit Court of the 10th Circuit still retains jurisdiction over the matter?

Mr. CHILD. Yes; fortunately.

Senator BURDICK. On page 20 of your statement you take exception to Judge Ritter's asking for a list of persons under investigation by the grand jury. You object that this constitutes judicial interference with the executive branch, yet you seem to suggest that this subcommittee should set itself up as a body to judge the propriety of judicial actions on his part during the subcommittee consideration of 1130.

Aren't both of these matters in violation of the separation of powers?

Mr. CHILD. I'm sorry, Mr. Chairman, but I didn't follow the question. I apologize.

Senator BURDICK. I'll read it again. On page 20 of your statement, you take exception to Judge Ritter's asking for a list of persons under investigation by the grand jury. Your objection was that this constituted judicial interference with the executive branch—you, as the prosecutor. Yet you seem to suggest that this committee set itself up as a body to judge the propriety of judicial actions as part of the subcommittee consideration.

Mr. CHILD. No. I don't ask this committee to act as a judicial body, but I'm pointing out to this committee that the grand jury, by statute, is supposed to have broad powers and it's not supposed to be limited by a judge. It's supposed to be independent and he attempts to dictate what it will do by asking a predisposition of what cases will be called, if he calls a grand jury.

He attempts to control the function of the U.S. attorney and desires to be the prosecutor, as well as the judge.

Senator BURDICK. I'm sure you're aware that this presents us with a very difficult jurisdictional problem here, since really the conduct of a judge is not directly involved; otherwise, it would be an impeachment; would it not?

Mr. CHILD. That is correct.

Senator BURDICK. Mr. Westphal, do you have any questions?

Mr. WESTPHAL. Yes, Mr. Chairman. Thank you. In looking over the material that you presented and that's been presented by other witnesses, we have had a little difficulty in analyzing the precise issue here, because if this bill passes, the exemption that was accorded to Judge Ritter and 31 other judges back in 1958 would be removed and he would no longer be the Chief Judge of the U.S. District Court for the District of Utah.

The other judge would, I assume, become the chief judge of that court; is that true?

Mr. CHILD. I would assume, yes.

Mr. WESTPHAL. Judge Ritter, however, would still remain as a judge of the District Court of Utah in regular active service; would he not?

Mr. CHILD. He would.

Mr. WESTPHAL. He would still be sitting as a trial judge?

Mr. CHILD. He would.

Mr. WESTPHAL. Under the Judicial Council order he would still be the judge in charge of criminal cases and proceedings in the central division of Utah; would he not?

Mr. CHILD. I would think that situation would soon change.

Mr. WESTPHAL. How would it change?

Mr. CHILD. There would be a new chief judge and under the new chief judge and the rights that he has under the statutes, as I read them, he would have the privilege of assigning cases. He would have that privilege until it was demonstrated that there was a dispute between the judges.

At that point, the dispute would be resolved by the 10th Circuit and I assume that the 10th Circuit would not necessarily leave the situation as it was between Judge Christensen and Judge Ritter some 15 to 20 years ago.

Mr. WESTPHAL. Well, I would suggest that we might look at section 137 of the statute, and assuming that the other judge becomes the chief judge, section 137 of title 28 provides "that the business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court. If the district judges in any district are unable to agree on the adoption of rules or orders for that purpose"—that is, for the purpose of dividing the business and assigning the cases—"the Judicial Council of the Circuit shall make the necessary orders." So that if S. 1130 is enacted into law, the second judge in Utah would be the chief judge. Judge Ritter would still be a judge in regular, active service.

I assume that since they have been unable to agree since the year 1958 that they would continue to be unable to agree on the division of the business of the court for as long as Judge Ritter would be a judge in regular active service. Is that a proper assumption?

Mr. CHILD. I don't believe so. I don't accept the assumption. I believe that the new judge who took Judge Christensen's place and had Judge Christensen still been the judge and thus become chief judge, you would have seen a great difference. The new judge, a junior judge, having to work and—bends over backward to keep the peace within the District.

If he, then, were given the mantle of chief judge so that he could control the hiring of the court clerks, of which we don't have one—it's hard to keep them—so that he could control the hiring of the staffs, he, with that mantle of authority, could stand up and express what he wants.

As it is, he accepts what is there.

Mr. WESTPHAL. The chief judge in Utah cannot get what he wants in the way of division of business or the assignment of cases. Under the statute, it takes the agreement of the two judges and if the two judges are unable to agree, it is then left up to the judicial council of the circuit. And you're assuming that if the other judge becomes the chief judge, then for some reason Judge Ritter and he will be able to agree, when they haven't been able to agree since 1957.

Mr. CHILD. Mr. Westphal, you're assuming facts that are not in evidence. The junior judge at the present time has only been there approximately 4 years. As such, there is no disagreement because he will not disagree with the chief judge under any circumstances.

If he were the chief judge, he would express his independent opinion.

Mr. WESTPHAL. And, if his independent opinion differed with the independent opinion of Judge Ritter, there would be a disagreement

between the two judges on the division of business and the assignment of cases and the judicial council would still have to exercise its powers under the statute; would they not?

Mr. CHILD. The judicial council would do so and I feel that they, given the opportunity, would rectify the problems that we have now.

Mr. WESTPHAL. Well, they have attempted to rectify that problem beginning in 1958 with their order which assigned to the two judges of Utah an equal and an impartial divison of civil cases and gave to each judge the power to preside over criminal cases and proceedings, each in his own division—Judge Ritter in the central division and the other judge in the northern division.

Mr. CHILD. And as it worked out, the central division has about 80 percent criminal load and it would have more if we could prosecute. Judge Ritter, at that time, was 18 years younger than he is now. He cannot now carry the load he did 18 years ago—and he does a marvelous job in some of the cases that he has.

Mr. WESTPHAL. The point, Mr. Child, is this. If Judge Ritter were not the chief judge, he would still be the resident judge in the central division. He would still be the trial judge in that division. He would still handle his share of the civil cases on trial. He would still handle criminal cases and proceedings in the central division; would he not?

Mr. CHILD. He would only until the then chief judge took issue with that situation and asked for a change.

Mr. WESTPHAL. The chief judge cannot take away from Judge Ritter the power to sit as an active district court judge. The judicial council of the 10th Circuit cannot take away that power. This was determined in the Chandler case, as I understand.

Now, the point I'm trying to get at is how the situation would change if you simply remove the word "chief" from Judge Ritter's title. He would still be an active judge. If the Government were not prepared to proceed with prosecutions, he would still dismiss them. In the absence of an order from the judicial council saying that he must give you the 21 days' advance notice of the setting of a calendar of criminal cases for trial, he would still be giving you either 6 days or 3 days or no day's notice.

How would it change if he were not the chief judge?

Mr. CHILD. What you failed to, in my opinion, take consideration of is that by removing the name "chief" from one judge, you don't just leave it out in limbo. You assign the name "chief" to another judge and that judge, thus, given this mantle of authority, begins to administer the problems of the district—not just the division, but the district. And those problems, once he has that mantle of authority, are his responsibility.

And Judge Anderson, whom I assume would then be the chief judge, would take issue with the way these courts are run and would require the imposition of written rules of the court. He handles his calendar in a very different way and, as chief judge, he would have great influence on this court.

Mr. WESTPHAL. I would assume that the adoption of local rules of court is a matter that has to be voted by the court, as distinguished from being voted by one judge of the court. So it would take the agree-

ment of the two judges—Judge Ritter and Judge Anderson, you say?

Mr. CHILD. Yes.

Mr. WESTPHAL. In order to adopt local rules of court. I don't perceive under the statute that the chief judge has the power to impose his will upon the second judge in the district; am I wrong?

Mr. CHILD. Is it not apparent that absent that agreement, the judicial council of the 10th Circuit steps in?

Mr. WESTPHAL. Well, there has apparently been no agreement on adoption of local rules of court for these many years in Utah and up to this point the judicial council of the 10th Circuit has not stepped in order to adopt local rules generally for Utah or even to adopt a special rule saying how much notice they must give to the U.S. district attorney prior to setting a group of criminal cases for trial; isn't that true?

Mr. CHILD. This is true.

Mr. WESTPHAL. You mentioned this matter of the underutilization of magistrates. I was interested in reading some correspondence included with Judge Lewis' statement concerning the development of the implementation of the Magistrate Act in the district of Utah.

And in an early letter Judge Ritter advised that he intended to make full use of the new magistrate system in Utah, that he outlined the type of duties that would be assigned to the magistrate, including the trial of petty offenses, and he also pointed out that in his judgment he thought that Utah needed two full-time magistrates and he expressed some reservations about the use of part-time magistrates for trial purposes because they would still be able to, as a part-time magistrate, practice law. And he felt that that might lead to conflict of interest.

Now, that correspondence also indicates that the judicial conference did not agree with his recommendation and did not, in fact, authorize any full-time magistrates for Utah. It did, however, authorize—and I think as agreed by Judge Ritter and the other judge—to have a halftime or $11,000 magistrate at Salt Lake City and an $8,500 part-time magistrate at Ogden with two minor ones, one at Cedar City and one at Provo.

After that was authorized, the magistrates at Cedar City and Provo were never appointed so that that authority was repealed by the judicial conference in about 1973. And then the part-time magistrates were not assigned any petty offense jurisdiction. They were assigned very little, if any, of the discretionary duties under section 636(b) of the statute.

And, in fact, the magistrates, such as they have had there in Utah, have performed basically only the duties that used to be performed by a U.S. Commissioner, except for the trial of petty offenses. Then at some point in 1974 or so, apparently both of the Utah judges and the judicial council of the 10th Circuit felt that the two part-time positions at Ogden and Salt Lake City and should be combined into a full-time magistrate and that, then, would meet Judge Ritter's initial feeling and would probably overcome his perception that a part-time magistrate is subjected to a conflict of interest.

But as I understand the record, the judicial conference still did not feel that there should be a full-time magistrate. Is that pretty much the situation?

Mr. CHILD. Yes. We're going backward on the magistrate situation in Utah. We now only have one halftime. We no longer have two halftimes; we now have one halftime.

Mr. WESTPHAL. Now, as I understand the statute on the petty offense jurisdiction of a magistrate, it requires that the court designate or specifically allot and authorize that magistrate to try these petty offenses that are permitted under section 3401 of title 18.

Now, your objection is that Judge Ritter, as chief judge, has not authorized that and apparently there's been no agreement between Judge Ritter and the other judge that the magistrate should be authorized petty offense jurisdiction; is that the situation?

Mr. CHILD. I have spoken with the other judge, who said to me last Friday that he's in favor of the magistrates having this jurisdiction.

Mr. WESTPHAL. I say, there's no agreement between the two of them. Judge Ritter is obviously opposed to the exercise of this petty offense jurisdiction.

Mr. CHILD. Obviously.

Mr. WESTPHAL. But the statute apparently does give to the judges of the court the discretion as to whether they will or will not authorize the magistrate to hold this petty offense jurisdiction.

Mr. CHILD. Correct. It requires the chief judge to approve it.

Mr. WESTPHAL. Are you suggesting that this committee should determine whether Judge Ritter abused his discretion in failing to authorize magistrates in Utah to exercise petty offense jurisdiction?

Mr. CHILD. I would suggest, rather, that this committee look at the fact that because of his age and predisposition, Judge Ritter has merely failed to do it and that the need is present.

Mr. WESTPHAL. Well, some of these things date back to a time before he was even 70 years of age.

Mr. CHILD. There we get to predisposition.

Mr. WESTPHAL. Well, again, you're talking about predisposition. You're talking about the man's conduct as a sitting judge and, again, doesn't this get us into an area where, under the constitution, the House has initial jurisdiction?

You're talking about grounds for removal. You're not talking about whether a "grandfather clause" should be repealed.

Mr. CHILD. Mr. Giuliani indicates that he would like to answer that, if it would be all right.

Mr. WESTPHAL. What is your answer, Mr Giuliani?

Mr. GIULIANI. Mr. Westphal, I think there is no doubt that there may be a question here about Judge Ritter's conduct as a judge. And there's no doubt that an awful lot of what Mr. Child put to you involved his misconduct as a judge. And I think a lot of that is relevant, but you have a different question.

The question is—a question that was addressed in 1958 and is being addressed again: Does this man or should this man serve with the dual function of chief judge and sitting judge? There's no doubt that a change in the law will not solve all or nearly all of the problems created by Judge Ritter. But that doesn't mean that it will not solve some.

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And the issue that it seems to me is before this committee is whether this exemption that now exists, for one man and for one man alone, is a valid one.

For instance, Judge Ritter now presides over grand juries. Over the last 5 years, those grand juries have sat for 57 days, which in my view, virtually extinguishes the criminal justice system in the State of Utah.

Mr. WESTPHAL. But that's a matter that you have now pending for determination by the 10th circuit under your petition for preemptory writ of mandamus over which proceeding the 10th circuit has retained jurisdiction.

Mr. GIULIANI. There's no question about that. I don't cite that for you to determine the merits or the demerits of our petition for mandamus. I cite it as an example of why Judge Ritter cannot function beyond the age of 70 as the chief judge of the State of Utah.

Mr. WESTPHAL. As I understand it, his views about the functioning of a grand jury are not something that he has just believed in in the last year or two. This is a problem that went back before he ever reached age 70. He has always had different views about the proper scope of the grand jury.

Mr. GIULIANI. I don't know whether that is true or isn't true. Mr. Child tells me that it isn't. And I don't know what his views of it were when he was 69 and 68 and 67. I do know that we now have a 77-year-old judge presiding over the court in Utah who hasn't convened a grand jury but for 57 days in the last 5 years.

Mr. WESTPHAL. All right. Let me ask you: "How many times in the last 5 years has the U.S. attorney in Utah, in cooperation with the Justice Department, petitioned the 10th circuit for a preemptory writ of mandamus requiring Judge Ritter to convene a grand jury?"

Mr. GIULIANI. It happened on at least one other occasion; didn't it, Mr. Child? At that point he convened a grand jury for a short period of time; is that correct?

Mr. CHILD. That is true. There was some discussion going on, as I recall, in the tenure of C. Nelson Day—preliminary. And it was just being discussed in the courthouse that they were about to go after a mandamus, at which time he did call a grand jury for a short period.

Mr. WESTPHAL. Again, do you have a grand jury that sits in the northern division? Do you convene one in the northern division?

Mr. CHILD. I'm happy you asked me that. Judge Anderson and before him, Judge Christensen, have grand juries sitting in the northern division at all times.

And it's a shame. We only really need one grand jury in the State of Utah.

Mr. WESTPHAL. If Judge Ritter is not the chief judge, he would still be the presiding judge in the central division and he will still have the power to either convene or not to convene a grand jury; isn't that true?

Mr. GIULIANI. I think that's a question that you have put on several of these things and I think the difference that would be created by Judge Ritter no longer being the chief judge would be that the new chief judge could initiate rules to solve these problems.

Chief Judge Ritter would then be in a position of having to object to those rules and they can be resolved by Judicial Council. And I think that is a much better posture to be in than having a junior judge

objecting to the practices of a senior judge and asking him to initiate it.

Mr. WESTPHAL. Did either Judge Christensen, when he was on the bench, or Judge Anderson, when he was on the bench, even though they were junior, did they ever attempt to initiate local rules and, upon the failure of the two of them to agree on local rules of court, refer the matter to the Judicial Council under section 332? Was that ever done, to your knowledge?

Mr. CHILD. To my knowledge, the question of local rules was not presented to the Judicial Council. It may have been. However, Judge Christensen adopted his own, since he couldn't get along with Judge Ritter. Judge Anderson has not seen fit to cross Judge Ritter in that.

Mr. WESTPHAL. You also, in your testimony, object, Mr. Child, to a trailing calendar practice, which I suppose another word for it is a "general calendar." You list the cases in order on the calendar and you start trying the first one; when that's out of the way, you try the second one, and so on.

Mr. CHILD. Correct.

Mr. WESTPHAL. Now, apparently Judge Ritter believes in that kind of a general trailing calendar and you would like either certain settings or a little more understanding from the judge as to when he is going to commence that calendar in light of your requirements for obtaining witnesses; isn't that correct?

Mr. CHILD. Yes. It is not necessarily the trailing calendar that bothers me. It's the lack of notice and the inflexibility of insisting on trying the cases in their order.

Mr. WESTPHAL. Well, again, but he would exercise that power and, I assume, make the same rulings if he were an active judge, as he now does, even though he did not have the title, chief judge.

Mr. CHILD. Oh, yes. He could do things like that and it would upset our office. However, I do believe that district court rules could be adopted, which he doesn't adopt. He prefers not to have written rules.

Mr. WESTPHAL. I understand that. The mere repeal of the "grandfather clause" isn't going to cure it unless the other judge proposes some local rules of court, unless the Judicial Council intervenes upon their failure to agree.

Mr. CHILD. That's right.

Mr. WESTPHAL. I have no further questions, Mr. Chairman.

Senator BURDICK. Thank you very much. Their statements will be made a part of the record without objection.

Senator BURDICK. Our next witness is Robert B. Hansen, deputy attorney general, Salt Lake City. Welcome to the committee, Mr. Hansen.

Mr. HANSEN. Thank you, Chairmann Burdick and Mr. Scott and Mr. Westphal.

STATEMENT OF ROBERT B. HANSEN, DEPUTY ATTORNEY GENERAL, SALT LAKE CITY

Mr. HANSEN. I appreciate the opportunity to testify here today. I know the issue is repeal of the grandfather clause for chief judges. Let me put the question in perspective. As you know, repeal of this clause affects only one man: Judge Willis W. Ritter. In fairness to this committee and in fairness to Judge Ritter, you should know that the

amendment's repeal to many would be a mild slap at the judge at a time he deserves a knockout punch.

The tenth circuit court of appeals Chief Judge David T. Lewis, who supports repeal, says that this hearing should be based on equity and reason and not on "whether Judge Ritter is a good, bad, or indifferent judge."

It would be good if we could separate the man and the issue. We cannot. If it were not for the judge's questionable actions, there would have been no effort to find a legal loophole to at least strip him of his chief judgeship.

The fact that Utah even had a chief judge as early as it did is tied to the controversy surrounding Judge Ritter. When he was appointed in 1949, he was the only Federal judge in the State. The appointment followed a bitterly debated confirmation hearing.

The American Bar Association opposed the appointment. Senator Arthur Watkins—you'll recall he was the Senate Judiciary Committee member who chaired the McCarthy hearings—did not block the nomination as he could have, but he did vote against it.

Four years later Utah got its second Federal judge: Judge A. Sherman Christensen. It was not because of the caseload that the second judge was added. Former Gov. J. Bracken Lee says there is no question the second judgeship was created to offset Judge Ritter.

Another observer at the time said the Utah bar thought some new blood might make it a viable court. Is the court viable today? In late 1972, as part of research for a book, a questionnaire was sent to members of the Utah bar. The results are shown here on this chart, which were computer compiled by a Utah polling firm.

Three hundred and ninety-seven responded. As to the judge's record, 13 percent rated it excellent; 12 percent said it was good; 8 percent, average; 25 percent said poor; and the largest category of respondents, 30 percent, rated his record as very poor.

They rated the judge's judicial temperament: 6 percent said he was always fair; 9 percent said usually fair; 24 percent said he was occasionally biased; and 49 percent said the judge was usually biased.

The question was asked: Should Judge Ritter retire as chief judge? Sixty-eight percent said "Yes." It is interesting to note that the survey spurred the Utah State bar to take an official poll of its own 1 year later. They received back 1,049 responses. The poll shows 77 percent of the bar wanted Ritter to step down as chief judge, a figure much higher than the earlier survey.

The first questionnaire allowed attorneys to make comments. One said, "The judge dispenses judicial tyranny rather than justice." Another said, "Judge Ritter was an excellent legal educator, however, he is not equipped with the proper temperament to be a judge." Yet another said, "he suffers from egomania."

Ironically, the same criticisms leveled now against Judge Ritter were raised 27 years ago at his confirmation hearings. Then, H. Grant Ivins, District Director of the Office of Price Administration, testified that Ritter, who served as OPA Regional Rent Director, was arbitrary, tyrannical, arrogant, and abusive.

It was the FBI report that probably heated up the hearings more than anything else. In fact, the report was the key in Senator Watkins delaying confirmation for several months. The Senator said the report

raised serious questions as to the integrity and the morality of the nominee.

The present sheriff of Salt Lake County, Delmar Larsen, was one of the FBI agents who wrote that report. Five years ago, a Judge Ritter-empaneled grand jury indicted Sheriff Larsen in a case involving the feeding of jail prisoners. The U.S. attorney, on orders from the Justice Department, refused to sign the indictment, saying the jury was improperly constituted.

U.S. attorney, C. Nelson Day, shortly before he died in an automobile accident, told a group of journalism students that the judge handpicked the jurors including foreman Maurice Warshaw. Grand jurors, as you know, are supposed to be picked at random. Amazingly, the same Maurice Warshaw had served on a previously Ritter-empaneled grand jury.

We looked at the opinions of the attorneys who worked under Judge Ritter. What do his judicial superiors think?

For a 26-year period, the judge was reversed or reversed in part in 54 percent of those cases appealed to the circuit. That's worse than a coin flip. Utah's other judge and his successor during that time were only reversed or reversed in part in 18 percent and 16 percent of their cases.

Notice that the judge's bad record gets worse as he passes the age of 70, the age he would have stepped down as chief judge, were it not for the grandfather clause. What does the circuit court say about these reversals?

A couple of quotes: "While the record discloses that the case was tried in an atmosphere of maximum emotion and a minimum of judicial impartiality * * *" and so on. Again: "Throughout the trial, the court assumed a hostile attitude toward representatives of the United States to such an extent that this court is of the view that a fair trial was not had."

Now, on this third chart we have here a graph of the number of writs filed against Judge Ritter since he turned age 70. I've compared Judge Ritter's record with the man who has the next worse record in the 10th circuit, Judge Chandler of Oklahoma.

During the same time Judge Christensen and his successor, Judge Alden J. Anderson, were only filed on once. The other 20 judges of the circuit received a total of 99 such writs. It is evident that Judge Ritter's conduct is objected to over 5 times as often as the average of all other judges and 30 times as often as the Utah district court judge.

Since Judge Ritter turned 70 years of age, he has had 39 writs filed against him, of which 8 were granted. He has served 23 percent of his time on the bench since turning age 70 and has received 78 percent of said writs during this time. Of all of the writs that have been granted against Judge Ritter from the time he has been on the bench, 73 percent of those writs granted were during the time that Judge Ritter has been 70 years of age and older.

What do some of the attorneys say when they ask the judge to be removed from a case? One said, "The Honorable Willis W. Ritter is so antagonistic and hostile to the affiant * * * that it will be impossible for Judge Ritter to preside over this case * * * ."

In 1972, Salt Lake City petitioned to have the judge removed from their case which involved the police commissioner who is an attorney. The city argued that Judge Ritter improperly belittled the commissioner years earlier during a case he was arguing.

The commissioner lost in Ritter's court and the ruling was reversed. Since then, the city says the judge held a personal grudge and feeling of animosity against the affiant * * *.

The most serious charge against Judge Ritter is that he has certain favorite or "pet" attorneys who appear in his court; that certain law firms enjoy a better chance of winning than others.

As deputy attorney general, I must live with that reality in protecting the State's interests. Utah has often gone to the additional expense of hiring an outside attorney, usually from the Salt Lake firm of Van Cott, Bagley, whenever we have an important case before Judge Ritter.

In fact, this past January, I told Utah's legislative appropriation committee that that was why we needed a $50,000 supplemental appropriation. We received it.

A recent Utah magazine article that I have here quoted an attorney who said, "Knowledgable clients will go to certain lawyers because they are more likely to win—in front of Ritter—or at least get kinder treatment and favorable rulings." The charge, if true—and I have testified and do testify that it is—is a shocking commentary on Utah legal community. Instead of censoring a bad judge, many attorneys would instead take advantage of the bias, if they enjoy "pet" status. It's much like a parent whose son chops down the neighbor's trees. Instead of correcting the child's fault, the parent takes advantage of it and sells the trees for firewood. The parent's crime is greater than the child's.

Let me explain further by moralizing a bit more. If a judge needed the services of a law firm for personal legal help, it would be wise for him to select a firm with little or no Federal practice. However, if he did retain a law firm which often engages in Federal practice, it would then be wise for the judge to bow out of any cases involving that law firm.

Judge Ritter has failed to follow such a standard. In fact, in the past few years he or his family has employed the services of no less than three Salt Lake City firms—Van Cott, Bagley, Cornwall & McCarthy: Jones, Waldo, Holbrook & McDonough; and Worsley, Snow & Christensen.

Each of these firms have a very substantial Federal practice. The court records show that Judge Ritter continued to hear cases presented by these law firms at the same time they were representing him or his family.

The record also curiously shows that rarely did these three firms engage in trials against each other. I could go on and on and talk about other areas involving Ritter's conduct as chief judge, such as the absence of court rules. His is the only district in our circuit without rules of court. I have personally observed on many occasions where this has led to fiascoes, a few of them reported by the press; his orders restricting access to court records, one of which our office was involved with; his orders unduly restricting press coverage of his court. I hope you or your staffs will take the time to read parts of this State brief and the

magazine that I have here that would give further specifics on these matters.

[The above referred to documents follow.]

[NOTE.—Magazine article is reproduced as exhibit to statement by Senator Garn.]

IN THE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 74-1036

STATE OF UTAH,

Plaintiff,

vs.

WILLIS W. RITTER, CHIEF JUDGE IN AND FOR THE UNITED STATES DISTRICT COURT IN AND FOR THE STATE OF UTAH,

Defendant.

ON PETITION FOR WRIT OF MANDAMUS OR IN THE ALTERNATIVE FOR A WRIT OF PROHIBITION

BRIEF IN SUPPORT OF THE PETITION FOR THE STATE OF UTAH

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BRIEF IN SUPPORT OF THE PETITION FOR THE STATE OF UTAH

JURISDICTION

This Court has jurisdiction and authority to issue the requested relief of the within petition pursuant to U. S. Code, Title 28, Section 1651, Rule 21 of the Rules of Procedure for the United States Court of Appeals, and inherent powers of supervision over local courts. *Metros* v. *U. S. District Court for District of Colorado*, 441 F. 2d 313 (10th C. C. A., 1971).

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QUESTIONS PRESENTED

1. Is petitioner entitled to a continuance of the deposition to be taken of an Assistant Attorney General until the disposition of the State Criminal Court proceeding on the basis of prejudice to that prosecution?

2. Is petitioner entitled to a protective order to limit the discovery available to the defendant in the subject State criminal case to that permitted under applicable State law?

STATEMENT OF FACTS

1. Petitioner has instituted criminal proceedings in the District Court of Salt Lake County, State of Utah, against one John J. Badger and others. See Exhibit "A", made a part of the petition.

2. On January 15, 1974, William J. Ungricht, Assistant Attorney General, was served with a subpoena to compel his attendance and production of documents at a deposition scheduled for January 31, 1974. The subpoena duces tecum is attached to the petition marked Exhibit "B". It directs the Assistant Attorney General Ungricht to "bring with you all books, transcripts, documents, notes and memoranda concerning Flying Diamond Corporation which are in your possession."

3. On January 23, 1974, the Attorney General of the State of Utah moved the Honorable Willis W. Ritter for a motion, pursuant to Rule 35(b) and Rule 26(c), F. R. C. P., to quash the subpoena, or in the alternative, to issue a protective order. This motion will be found as Exhibit "C" to the petition. The grounds of this motion are that the subpoena calls for the production of docu-

ments, memoranda and work products of the Utah State Attorney General, and his staff, which have been assembled in connection with the criminal investigations; that as Assistant Attorney General he prepared and interviewed all concerned in connection with his duties and is presently serving as prosecutor in the pending criminal action entitled, "State v. American Stock Transfer Co., Jay Victor Miller, Evelyn Mitchener, Michael Halfhill and John J. Badger"; that the attorney seeking the deposition is attorney of record for the defendant Badger in the State case, but represents a different party in the federal civil action; that the deposition is sought not only for the purpose of obtaining evidence in that case, but for use in the pending State criminal action. A hearing was held by the lower court and on January 28, 1974, the motion was denied.

On January 30, 1974, the petitioner, through its Attorney General, moved the lower court for an order that the said deposition be continued until after the trial of the aforesaid criminal case. The grounds of this motion are that the taking of said deposition will be prejudicial to the public interests and rights of the State of Utah inasmuch as the said deposition will enable counsel in the State criminal case to obtain discovery beyond that allowed by the laws of the State of Utah. This motion is attached to the petition and is marked Exhibit "E", Jan. 30, 1974. The lower court denied this motion on February 1, 1974, and a copy of the order is attached to the petition marked Exhibit "F".

On page 3 of the petition, it is stated: "It is the strong belief and opinion of the undersigned that the relief re-

quested in this petition is not only critical to avoid prejudice and injury to petitioner in the instant criminal proceeding but that other criminal proceedings will be prejudiced in the future if [a] defendant's counsel can utilize federal civil suits as a means of obtaining discovery in criminal cases beyond that allowed by Rule 16, R. F. C. P., and other applicable laws," whether such suits are bona fide or not.

POINT I.

THE STAY OF CIVIL DISCOVERY PROCEEDINGS TO ALLOW THE CRIMINAL CASE TO BE DISPOSED OF FIRST SHOULD HAVE BEEN GRANTED BY THE COURT.

Campbell v. *Eastland*, 307 F. 2d 478 (5th C. C. A. 1962, cert. denied, 371 U. S. 955, 83 S. Ct. 502, 9 L. Ed. 2d 502), is the leading case. There the Director of Internal Revenue refused to produce reports of agents who had investigated the tax frauds; U. S. Attorney having been so ordered by his superiors to make such refusal, he, therefore, was not defiant, acted in "good faith," in a civil discovery proceeding. The Director had asked for a stay of civil discovery proceedings to allow the criminal case to be disposed of first, claiming privilege of the reports, the motion for discovery being a "cover-up" to allow taxpayers to inspect criminal files for information not available to them before trial of the criminal case except under the strict rules of criminal procedure, and the Jencks Act, 18 U. S. C. A. § 3500. The District Court granted the taxpayers' motion upon the ground that, if a civil suit is bona fide, it should be kept separate from the criminal action. The Circuit Court at pages 483, 485-487, said:

". . . This is the fatal defect in the proceedings below (p. 483).

. . . . .

"There are times, however, when the Government, *because it is the Government*, must withhold or postpone full disclosure. This is such a time (p. 485).

. . . . .

". . . all discovery rules exempt privileged matter (p. 485).

. . . . .

"In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters and *in ruling on motions under the civil discovery procedures, a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases*" (p. 387; italics supplied).

. . . . .

". . . To obtain discovery of work-products, there must be an unusually strong showing of good cause to justify discovery of such writings; they are not absolutely privileged. Hickman v. Taylor, 1947, 329 U. S. 495, 67 S. Ct. 385, 91 L. Ed. 451. *The District Director, however, has never claimed absolute privilege; he has asked only that discovery be postponed.* The real issue, therefore, is whether there was good cause for the order when and as it was issued (p. 486; italics supplied).

". . . *There is a clear-cut distinction between private interests in civil litigation and the public interest in a criminal prosecution, between a civil trial and a criminal trial, and between the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.* But these distinctions do not mean that a civil action and a criminal action involving the same parties and some of the same

> issues are so unrelated that in determining good cause for discovery in the civil suit, a determination that requires the weighing of effects, the trial judge in the civil proceeding should ignore the effect discovery would have on a criminal proceeding that is pending or just about to be brought. The very fact that there is a clear distinction between civil and criminal actions requires a government policy determination of priority: which case should be tried first. *Administrative policy gives priority to the public interest in law enforcement.* This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities" (p. 487; italics supplied).

. . . . .

The Court then pointed out that the criminal rules of discovery are far more restrictive than the civil rules. Continuing, the Court, at page 487, said:

> ". . . *A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery* and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit. Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other. In some situations it may be appropriate to stay the civil proceedings . . ." (p. 487; italics supplied).

Here, however, the trial judge seemed to think he had no discretion — once discovery was moved for in a civil suit.

The Court, at page 488, further said:

> ". . . the trial judge found or — expressed the opinion — that 'to be honest about it' the purpose of the discovery was 'to see about [the] defenses in a criminal case.' There the proceedings should have ended, with dismissal of the motion or a stay of the proceedings."
>
> "Instead, the trial judge held that the suit for refund was a bona fide suit, and as such, it was completely 'independent' of the criminal case. If a taxpayer files suit in bad faith, it is an abuse of process; but his good faith on a suit for refund does not sanctify the motion for discovery. We take the view that whether or not the suit, as distinguished from the motion, was bona fide, the effect of granting the motion was to give pre-trial discovery of documents denied the taxpayer in the criminal case . . . *It was an open invitation to taxpayers under criminal investigation to subvert the civil rules into a device for obtaining pre-trial discovery against the Government in criminal proceedings.* (Italics supplied).

This case in effect holds that civil discovery is not intended to be a "*backdoor*" method of accomplishing criminal discovery, or to subvert the limitations on it.

The Court, at page 490, stated:

> "Summarizing, in balancing the individual's right to prepare his case promptly against the public interest in withholding the full disclosure sought here, the following elements tip the scales in favor of the District Director: (1) discovery would give the taxpayer possession of reports denied him in the criminal proceeding; (2) there is reason to think, 'to be honest about it', that the mo-

tion for discovery (if not the suit for refund) was for the purpose of obtaining the otherwise unobtainable reports; (3) the Government was not the moving party seeking to recover while withholding information that might defeat recovery; it assessed no deficiency and asserted no counterclaim; (4) the District Director did not claim an *absolute privilege but asked only for a reasonable delay;* (5) the record is bare of any showing that a reasonable delay would have prejudiced the taxpayer in the civil suit; (6) limited discovery by interrogatories and other remedies were available to the taxpayer; . . . In short, the taxpayer failed to show good cause for the order of discovery issued in this case.

. . . . .

". . . The United States Attorney, however, acted under instructions from his superiors, made a good faith refusal, and respectfully explained his legal position to the Court. *Notwithstanding the trial judge's indignation,* therefore, *we do not have before us a defiant litigant whose defiance as an agent of the United States, is particularly irresponsible and ill-becoming.*" (Italics supplied).

POINT II.

THE MOVANTS FOR DISCOVERY IN THE CIVIL ACTION HERE FAILED TO MEET THE BURDEN NECESSARY TO SHOW "GOOD CAUSE," HENCE THE "PUBLIC INTERESTS" AND THE "INTERESTS OF JUSTICE" REQUIRED GRANTING OF THE STAY OF CIVIL PROCEEDINGS UNTIL THE STATE CRIMINAL CASE IS CONCLUDED.

The litigants in the following cases, seeking to obtain in pending civil litigation, discovery by subpoena *duces tecum* which had been secured for use in criminal prosecutions then pending or about to be instituted, failed completely to show the necessary "*good cause*" required for the production of information under Rule 34.

In the *Campbell* v. *Eastland* case, *supra,* the Court in some detail made it clear that the determination of "*good cause*" for discovery in the civil suit, requires the weighing of effects, and the trial judge in the civil proceeding should not ignore the effect discovery would have on a criminal proceeding that is pending. The Court said:

> ". . . If a taxpayer files suit in bad faith, it is an abuse of process; but his good faith on a suit for refund does not sanctify the motion for discovery. We take the view that whether or not the suit, as distinguished from the motion, was bona fide, the effect of granting the motion was to give pre-trial discovery of documents denied the taxpayer in the criminal case . . . It was an open invitation to taxpayers under criminal investigation to subvert the civil rules into a device for obtaining pre-trial discovery against the Government in criminal proceedings." 307 F. 2d at page 288.
>
> ". . . A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as *a dodge to avoid the restriction on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit.*" *Id.,* at page 487. (Italics supplied.)

Securities and Exchange Comm'n v. *Control Metals Corp.,* (D. C., S. D. N. Y. Civ. Div. 1972), 57 F. R. D. 56,

was an action for injunctive relief. Sachs, one of the defendants, served notices of deposition on four witnesses and plaintiff moved for protective order to stay taking of depositions pending disposition of criminal proceedings. In absence of showing by defendant that he in fact would be prejudiced by the delay, the District Court, at page 57, said:

> ". . . In that posture of affairs, defendant Sachs served notices of deposition on four witnesses who, as the Court is informed, are likely to be called as Government witnesses in the current Grand Jury proceeding and in the expected criminal action. The Commission moved pursuant to F. R. Civ. P. 26(c) for a protective order to stay the taking of those depositions pending disposition of the criminal proceeding.
>
> "The Commission invokes the general policy that the Court should not permit civil discovery proceedings to be used to aid a party in a related criminal matter, Campbell v. Eastland, 307 F. 2d 478 (5th Cir. 1962), cert. den. 371 U. S. 955, 83 S. Ct. 502, 9 L. Ed. 2d 502 (1963), United States v. One 1964 Cadillac Coupe DeVille, 41 F. R. D. 352 (S. D. N. Y. 1966). Defendant Sachs, with commendable candor, concedes that such hoped-for aid in the criminal matter was a principal motivation in seeking to take these depositions."

The Court granted the stay pending disposition of the criminal proceedings.

The fact that this was an action for *injunctive relief* offered no exception to the delay rule since there was *no showing of prejudice* to defendant Sachs by such procedure taken by the Court.

United States v. *Maine Lobstermen's Assn.*, (D. C., S. D. Maine, 1958), 22 F. R. D. 199, was a civil action by the United States. The defendants sought to take the depositions under Rule 30, F. R. Civ. Proc., 28 U. S. C. A. of five persons who had appeared before the grand jury which had returned an indictment in a companion criminal case against the same defendants. The Government filed a motion for an order deferring the taking of the deposition, relying on *United States* v. *A. B. Dick Co.*, 7 F. R. D. 442, and *United States* v. *Linen Supply Institute*, 18 F. R. D. 452, in both of which the courts refused to compel the Government to answer the interrogatories until companion criminal antitrust proceedings had been disposed of. The defendants were unable to indicate any *prejudice* would result to them in their civil proceeding if the Court granted deferment. The Court determined that the defendants in the criminal actions cannot take advantage of the coincidence of a companion civil case to obtain prosecution evidence which is not available under the Fed. Rules of Crim. Proc., 18 U. S. C. A.

The District Court, at pages 200-201, said:

> ". . . As the Court reads these opinions, the requested deferments were granted by the courts because the patent purpose of the interrogatories was to obtain information through the medium of the civil proceedings to which the defendants were not entitled, or in a manner in which the defendants were not entitled, under the criminal rules, the courts being satisfied that *no showing had been made that prejudice to the rights of the defendants* in the preparation of their defense *in the civil proceedings would result* from the deferment.

"Counsel for the Government have also called to the Court's attention the unreported ruling of the District Court for the District of Columbia in United States v. Parke, Davis & Company, Civil Number 1064, June 26, 1957, which apparently involved the precise question presented to this Court upon this motion and in which the court ruled from the bench that it would not permit the requested depositions to be taken until after the trial of the criminal case.

. . . . .

". . . *no prejudice* to the defendants in the preparation of their defense in this civil action will result, and being of the opinion that defendants in criminal actions cannot properly take advantage of the coincidence of a companion civil case to obtain prosecution evidence which would not otherwise be available to the defendants under the Federal Rules of Criminal Procedure, 18 U. S. C. A., for use in the criminal case, the taking of the depositions . . . will be deferred until the companion criminal case against these same defendants in [the criminal case] in this Court . . . is disposed of." (Italics supplied.)

United States v. *Steffes*, a criminal action, No. Crim. 240, and *S. E. C.* v. *Great Plains Acceptance Corp.*, a civil suit, No. Civ. 403, 35 F. R. D. 24, (D. C., D. Montana, Billings Div. 1964), arose out of the same conduct and transactions which were the subject of the civil action. Motions were made by the government in the criminal case and by the S. E. C. in the civil suit to stay proceedings in the civil proceedings and to quash the subpoenas to take depositions by the defendant until the disposal of the criminal proceedings.

The defendant Steffes moved to strike the pleading of

the S. E. C. for the reason *it was not a party to the criminal action*, that the court may not consolidate civil and criminal proceedings and issue an order upon such consolidation of these proceedings, and to vacate the stay of the civil suit and to dismiss the proceedings upon the ground of no cause shown for the issuance of the stay order.

It was admitted that the Federal Rules of Criminal Procedure contain no provision authorizing the desired depositions. To a large extent both parties relied on the same case of *Campbell* v. *Eastland*, 307 F. 2d 478, in which case the facts of the civil action were inextricably interwoven with those of a criminal prosecution for fraud.

The Court, at pages 26, 27, said:

". . . The plaintiff in the civil action, the taxpayers, filed a motion under Rule 34 of the Federal Rules of Civil Procedure for an order requiring the District Director of Internal Revenue to produce the reports of the investigating agents. *The reports were in the United States Attorney's criminal files.* The Director asked for a stay of the motion pending disposition of the criminal case. He contended 'that the reports were privileged; that the motion for discovery was a *cover-up* to allow the taxpayers to inspect criminal files for information not available to them *before* the trial of the criminal case and then available only under the strict rules of criminal procedure . . .' The trial judge held that the civil action was 'independent of any criminal action' and granted the motion to produce . . . The court of appeals reversed, pointing out that Rule 34, F. R. Civ. P. allo[illegible] discovery of documents only after showing 'good cause' and specifically stated that its decisions turned on the facts bearing on good cause.

"'. . . in determining good cause for discovery in the civil suit, a determination that requires the weighing of effects, the trial judge in the civil proceeding should (not) ignore the effect discovery would have on a criminal proceeding that is . . . A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as *a dodge* to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit. Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other.'

"It must be remembered that the court found that *good cause* had not been shown as required for production under Rule 34. . . .

. . . . . .

". . . Defendant argues further that the Campbell case was concerned with an attempt to discover material privileged under the *work product doctrine*, and that no privileged material is involved.

"*I think the statement as to the right to take depositions must be read in context of the whole opinion.* There the court was not concerned with an attempt to take depositions of prosecution witnesses. But in determining *good cause* for production the court carefully delineated the line between civil and criminal discovery processes. The court did not say that Rule 26 of the Civil Rules of Civil Procedure could be used as a device to take depositions for use in a criminal case, where the depositions could not be taken under Rule 15 of the Federal Rules of Criminal Procedure.

"Judge Bell, who concurred specially, I think

lucidly stated the basis with which the whole court agreed. He said: 'The criminal aspect of the matter could not be ignored. The end result was tantamount to allowing discovery under Federal Rules of Civil Procedure in a criminal proceeding, *something we are powerless, as was the trial court, to authorize.*'

"But, argues defendant, depositions may be taken under Rule 26 *as a right*, in the absence of a showing of *good cause* for a denial thereof. I think *good cause* for the stay has been shown. Just as the court in Campbell considered the interwoven civil and criminal factual relation in determining a lack of *good cause* for production, so here the same factors have been considered in determining that *there is good cause for the stay.*" (Italics supplied).

In *United States* v. *Leta*, 60 F. R. D. 127, (D. C. M. D. of Pennsylvania, July 1973) a motion was made by defendants to compel disclosure of all exculpatory material and information in the possession and control of the United States. The District Court held, *inter alia*, that discovery would be denied in relation to their request for all statements, memorandum and summaries of statements, recordings and transcriptions of statements, made *by any person to an agent of the United States or the State of Pennsylvania in connection with subject matter of criminal case* and as to request by defendants that the Government disclose the statements of persons who were not prospective witnesses, where, *inter alia*, defendants *made no assertion of materiality* other than the general assertion that the statements *might be favorable to their defense*, and that the Government should disclose to defendants the *criminal*

records of all persons that the Government intended to call to trial, but because of the limited purpose for which such information could be used by defendants, the Government would not be required to produce such records prior to trial. The Court at pages 129-131 said:

> "Defendants base the motion on the holding in Brady v. State of Maryland, 373 U. S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215 (1963).
>
> . . . . .
>
> "In my view, Defendant's motion goes beyond the scope of the *Brady* doctrine. They not only request disclosure of material favorable to them on the question of guilt, but in effect they request disclosure of all information relevant to the case. Such wholesale disclosure of the prosecution's case is not required by the Constitution or statutes of the United States.
>
> . . . . .
>
> ". . . The *Brady* doctrine 'does not require the government to disclose the myriad immaterial statements and names and addresses which any extended investigation is bound to produce'." Citing *United States* v. *Jordan*, 399 F. 2d 615.
>
> . . . . .
>
> ". . . In my view, the requested items are internal government documents the discovery of which is precluded by F. R. Crim. P. 16 (b).
>
> . . . . .
>
> ". . . the Court will deny Defendant's request in § 6 [of defendant's motion] that the Government disclose the names and addresses of all persons who have some knowledge of the facts of the case. No showing of materiality or reasonableness has been attempted."

United States v. *Kessler*, (D. C., D. Minn. 2d Div., July 1973) 61 F. R. C. 11, was a prosecution for misapplication of bank funds and making false entries.

Motions for severance, for misjoinder were made, and seeking discovery and inspection of certain reports, memoranda and statements in possession of the Government.

The Court held that the documents requested in the hands of the Government were exempt from production where they constituted internal Government reports prepared in connection with the investigation and prosecution of the case.

The Court, at pages 12-13 said:

> ". . . The Rule [16 F. R. Crim. Proc.] excepts from discovery 'reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in Title 18, U. S. C. § 3500.' Section 3500 contemplates that the statements of government witnesses will be released to defendant *only after the witness has testified at trial.* [Italics supplied.] Although the affidavit of defendant's attorney raises the possibility that the rule enunciated by the Supreme Court in Brady v. Maryland, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), may be applicable, it is our view that the prosecution is not obliged under the *Brady* rule to make pretrial disclosures of material otherwise exempt from discovery under Rule 16(b) [citing cases]. Because the requested documents are internal government reports prepared in connection with the investigation and prosecu-

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tion of this case they are exempt from production under Rule 16(b). See United States v. Barber, 297 F. Supp. 917 (D. Del. 1969). Statements made by employees of the First National Bank of New Prague and of the Savage State Bank to federal authorities *need not be produced until such employees testify at trial.* 18 U. S. C. 3500. [Italics supplied.]

"Defendant's motion for separate trial and severance for misjoinder is granted;

"Defendant's motion for discovery and inspection is denied."

In *United States* v. *Bridges,* (D. C., N. D. Cal., S. Div., 1949), 86 F. Supp. 931, the defendant was indicted under the Nationality Act of 1940, § 338, 8 U. S. C. A. § 738, 18 U. S. C. A. §§ 371, 1015(a), and the Government also instituted de-naturalization proceedings against defendant. He invoked the discovery process under F. R. Civ. Proc. § 33, 28 U. S. C. A., *seeking testimony of the Attorney General* and the *Director of the F. B. I.* under Rule 26, F. R. Civ. Proc. "The scope of the relief sought under the Discovery Process in the Civil Proceeding is sweeping." The Government moved to stay the proceedings instituted by defendant until final disposition of the criminal proceedings. The Court, citing *Penn.* v. *Auto. Ins. Co.,* 27 F. Supp. 336, at page 933, quoting from that case, said:

> "'Where *public policy intervenes,* the rule (of discovery) should not be applied literally, and I have therefore denied plaintiff's motion to require defendant to furnish the names of their witnesses and to perimt their interrogation before trial . . . plaintiff should not be armed with the information

in advance so as to prepare an alibi.'" (Italics supplied.)

Continuing the Court then stated:

> "This Court has concluded that in the exercise of sound discretion and *in the interest of public policy* that all proceedings in this action . . . are hereby stayed until the final disposition of criminal proceedings . . ." (Italics supplied.)

In *United States* v. *A. B. Dick Co.,* (Civil No. 24188), 7 F. R. D. 442, (D. C., N. D. Ohio, E. D. 1947), it appeared the defendants were indicted for violation of the Sherman Anti-Trust Act. Simultaneously with the Grand Jury's presentment of the indictment, the Government filed the instant suit against the defendants in which it seeks to enjoin them from violation of the Act. The allegations in the two actions are identical. The Court, at page 442, said:

> ". . . It is therefore logical to assume that the same proof will be offered to support the charges contained in the indictment as will be introduced to obtain the relief sought under the Complaint.
>
> "Motions for bills of particulars were made by the various defendants to enlarge upon the allegations of the indictment."

In the criminal phase of the cases (see 7 F. R. D. 437, Crim. No. 18981, 1947) the Court overruled in part the motions for the Government to furnish particulars as to certain charges, stating that *the Government cannot "be required to make a complete disclosure of its entire case.* That is not the function of a bill of particulars. Rubio v. United States, [22 F. 2d 766]." (Italics supplied.)

In that civil suit the defendants addressed numerous interrogatories to the Government under Rule 33, R. Civ. Proc., 28 U. S. C. A. following section 723c, "seeking to obtain disclosures of the written and oral evidence which supports the accusation and the names of witnesses who will testify on behalf of the Government." *Id.*, at pages 442-443.

The Government moved for an order

> ". . . to dismiss the interrogatories without prejudice to renewal upon the disposition of the pending indictment, or, in the alternative, to extend the time of the plaintiff to file objections or to respond to them until the disposition of the criminal charges."

The Court, at page 443, said:

> "It is urged in support of the motion that to require plaintiff at this time to answer the interrogatories would have the effect of circumventing the decision of this Court on the defendants' motions for bills of particulars. It is pointed out that the very information which the Court refused to have furnished in the criminal case will be made available through the response to the interrogatories. Plaintiff contends that the disclosure of the information may jeopardize its position in the prosecution and *interfere with the administration of justice.*
>
> "The defendants oppose the motion and assail the above contentions. They maintain that the plaintiff chose to file the civil action with the return of the indictment and hence cannot deprive the defendants of the benefits afforded them under the rules of discovery.

> "There are no adjudicated cases which shed light on the specific question here presented." (Italics supplied.)

The Court stated that the sole question is whether delay in obtaining answers to the interrogatories will prejudice the rights of the defendants or whether the failure to furnish the information sought until the disposition of the criminal case will deprive these defendants of the benefits bestowed by the rules of discovery. In answer thereto the Court, at page 443, said:

> ". . . No compelling reasons are shown to convince this Court that the defendant will be injured by extending the time to file objections to or respond to the interrogatories until the disposition of the criminal suit."

United States v. *One* 1964 *Cadillac Coupe*, (D. C., S. D. N. Y., 1966), 41 F. R. D. 352 was an auto forfeiture action. A motion was made by the Government for a stay of interrogatories in the civil discovery proceeding until disposition of pending criminal action.

Both the civil and criminal proceedings arose out of same or related transactions by which

> ". . . the Government is ordinarily entitled to a stay of all discovery in the civil action until disposition of the criminal matter. Campbell v. Eastland, 307 F. 2d 478, cert. den. 371 U. S. 955, 83 S. Ct. 502, 9 L. Ed. 2d 502 (1963); United States v. Bridges, 86 F. Supp. 931 (S. D. Cal. 1949); United States v. $2,437.00 United States Currency, 36 F. R. D. 257 (E. D. N. Y. 1964); United States v. Steffes, 35 F. R. D. 24 (D. Mont. 1964); United

States v. Maine Lobstermen's Ass'n, 22 F. R. D. 199 (D. Maine 1958); United States v. Linen Supply Institute, 18 F. R. D. 452 (S. D. N. Y. 1955); United States v. A. B. Dick Co., 7 F. R. D. 442 (N. D. Ohio 1947); United States v. One 1963 Chevrolet Sedan, Misc. No. 63-M-1239, E. D. N. Y. 1963; Zara Contracting Co. v. New York, 22 A. D. 2d 415, 256 N. Y. S. 2d 98 (3d Dep't 1965). The justification for this rule is that *a defendant in a criminal case should not be permitted to use the liberal civil discovery procedures to gather evidence which he might not be entitled to under the more restrictive criminal rules.* Campbell v. Eastland, supra." (Italics supplied.)

The claimant contended that the Government waived the right to the protective order to which it might otherwise be entitled since nearly three months have elapsed since the interrogatories were served.

The Court, at page 354, said:

". . . The question thus becomes whether the government's motion was 'seasonably made,' or alternatively, whether the government's delay could be termed 'excusable neglect'."

After reviewing the facts in regard to this delay, the Court, at pages 354-355, said:

". . . Under the circumstances I conclude that the laxity demonstrated by the government in this case does not constitute a 'wilfull' failure to serve answers which would warrant dismissal of the action. See Rule 37(d), F. R. Civ. P. Accordingly, the claimant's motion to strike and dismiss is denied."

. . . . .

". . . the claimant's interrogatories in the case at bar are plainly directed toward securing information regarding the legality of the seizure of the automobile in light of Fourth Amendment criteria. Though information of this nature is relevant in a forfeiture proceeding, see One 1958 Plymouth Sedan v. Com. of Pennsylvania, 380 U. S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170 (1965), it is obviously of paramount importance in the pending criminal action. Under the circumstances *the fact that counsel for the government was dilatory is not a ground for authorizing a criminal defendant to utilize the discovery devices of the Federal Rules of Civil Procedure.* Cf. United States v. Summerlin, 310 U. S. 414, 60 S. Ct. 1019, 84 L. Ed. 1283 (1940). Thus the government's motion for a stay has been seasonably made within the meaning of Rules 30 and 33.

"The motion for a stay of all discovery proceedings in this action until disposition of the criminal actions presently pending is granted." (Italics supplied.)

POINT III.

THE UNLIMITED SCOPE OF CIVIL DISCOVERY ALLOWED BY THE RESPONDENT JUDGE WAS CONTRARY TO LAW AND THIS COURT SHOULD DIRECT THE RESPONDENT TO LIMIT IN THE FUTURE SUCH CIVIL DISCOVERY IN ADDITION TO ORDERING THE DELAY REQUESTED UNTIL THE TRIAL OF THE CRIMINAL CASE.

Independent of the motion to stay the civil proceedings until after the criminal case pending in the courts

of the State has been disposed of, and until the witnesses of the State have testified in that criminal action, the Attorney General of Utah could have asserted here all the power vested in him by law to refuse to obey the subpoena *duces tecum* in the civil proceedings involved upon the ground of "privilege" as being in the "best public interests" and "in the interests of justice."

In *United States ex rel. Touhy* v. *Ragen, Warden*, 340 U. S. 462, 95 L. Ed. 417, 71 S. Ct. 416 (1951), the Court held that the Attorney General can validly withdraw from his subordinates the power to release department papers. It was also held that the employee's refusal to produce the papers was proper.

The records requested by the subpoena *duces tecum* were claimed by the petitioner to contain evidence establishing that his conviction was brought about by fraud. In these circumstances the District Court found Mr. McSwain guilty of contempt of court in refusing to produce the records referred to in the subpoena and sentenced him to be committed to the custody of the Attorney General . . ." *Id.*, at page 465. The Court said that the Court of Appeals in reversing the District Court found:

> ". . . that Mr. McSwain was called upon 'to produce all documents and material called for in the subpoena without limitation and that at no time was he questioned, as to his willingness to submit the papers for determination as to materiality and best public interests.' Consequently, he was not guilty of contempt unless the law required the witness to make unlimited production. The court thought that, since this last would mean there was not privilege in the Department to refuse production, such a holding should not be made." *Id.*, at page 466.

The Court, at page 467, said:

> ". . . The validity of the Superior's action is an issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release department papers."

Continuing the Court, at page 468, said:

> ". . . that Mr. McSwain in this case properly refused to produce these papers. We agree with the conclusion of the Court of Appeals that since Mr. McSwain was not questioned on his willingness to submit the material 'to the Court for determination as to its materiality to the case' and whether it should be disclosed, the issue of how far the Attorney General could or did waive any claimed privilege against the disclosure is not material in this case."
>
> . . . . .
>
> ". . . When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious. Hence, it was appropriate for the Attorney General, pursuant to the authority given him by 5 U. S. C., § 22, to prescribe regulations, not inconsistent with law for 'the custody, use, and preservation of the records, papers, and property appertaining to the Department of Justice, to promulgate Order 3229.' "

In conclusion the Court, at pages 469-470, said:

"... This case is ruled by *Boske* v. *Comingore*, 177 U. S. 459, [44 L. Ed. 846, 20 S. Ct. 701].

"That case concerned a collector of internal revenue adjudged in contempt for failing to file with his deposition copies of a distiller's reports in his possession as a subordinate officer of the Treasury. The information was needed in litigation in a state court to collect a state tax. The regulation upon which the collector relied for his refusal was of the same general character as Order No. 3229. After referring to the consitutional authority for the enactment of R. S. § 161, the basis, as 5 U. S. C. § 22, for the regulation now under consideration, this Court reached the question of whether the regulation centralizing in the Secretary of the Treasury the discretion to submit records voluntarily to the Court was inconsistent with law, page 469. *It concluded that the Secretary's reservation for his own determination of all matters of that character was lawful.*

"We see no material distinction between that case and this." (Italics supplied.)

In *United States* v. *Kordel*, 397 U. S. 1 (1969), 25 L. Ed. 2d 1, 90 S. Ct. 763, the Court in considering a motion for a stay of the proceedings in a civil suit or to extend time for answering the interrogatories until after disposition of any criminal proceeding, involved, at page 12, footnote 27, was careful to call attention to the fact that —

"Federal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seem to require such action, sometimes at the request of

the prosecution, *Campbell* v. *Eastland*, 307 F. 2d 478, cert. denied, 371 U. S. 955 [the leading case]; *United States* v. *Bridges*, 86 F. Supp. 931, 933; *United States* v. *30 Individual Cartoned Jars* . . . 'Ahead Hair Restorer . . ., 43 F. R. D. 181, 187 n. 8; *United States* v. *One 1964 Cadillac Coupe DeVille*, 41 F. R. D. 352, 353-354; *United States* v. *$2,437 United States Currency*, 36 F. R. D. 257; *United States* v. *Steffes*, 35 F. R. D. 24; *United States* v. *Maine Lobstermen's Assn.*, 22 F. R. D. 199; *United States* v. *Cigarette Merchandiser's Assn.*, 18 F. R. D. 497; *United States* v. *Linen Supply Institute*, 18 F. R. D. 452; sometimes at the request of the defense, *Kaeppler* v. *Jas. H. Matthews & Co.*, 200 F. Supp. 229; *Perry* v. *McGuire*, 36 F. R. D. 272; cf. *Nichols* v. *Philadelphia Tribune Co.*, 22 F. R. D. 89, 92."

Thus the Supreme Court realizes the necessity for stays of depositions or discovery in civil cases pending the disposition of a criminal action involving the same situation or substantially the same as in the civil case, especially where, as in the instant case, "the interests of justice" and "public interests" require such action.

It is a recognized principle of law that official information privilege is subject to a generally overriding requirement that disclosure would be contrary to the interests of justice and the public.

Rule 509 (a), Supreme Court Rules of Evidence, effective July, 1973, 34 L. Ed. 2d 1, 54 *et seq.*, in defining official information in par. (2) states:

"'*Official information*' is information within the custody or control of a department or agency of the government the disclosure of which is shown

to be contrary to the public interest and which consists of (A) intra-governmental opinions or recommendations submitted for consideration in the performance of decisional or policy making functions, or (B) subject to the provisions of 18 U. S. C. § 3500, investigatory files compiled for law enforcement purposes and not otherwise available, or (C) information within the custody or control of a governmental department or agency whether initiated within the department or agency or acquired by it in its exercise of its official responsibilities and not otherwise available to the public pursuant to 5 U. S. C. § 552.

"(b) General Rule of Privilege. The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule.

. . . . . .

"(d) Notice to Government. If the circumstances of the case indicate a substantial possibility that a claim of privilege would be appropriate but has not been made because of oversight or lack of knowledge, the judge shall give or cause notice to be given to the officer entitled to claim the privilege and shall stay further proceedings a reasonable time to afford opportunity to assert a claim of privilege.

"(e) Effect of Sustaining Claim. If a claim of privilege is sustained in a proceeding to which the government is a part and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an

issue as to which the evidence is relevant, or dismissing the action."

The Advisory Committee's Notes regarding Subdivision (e) of the Rules state:

> "*If privilege is successfully claimed by the government in litigation to which it is not a party, the effect is simply to make the evidence unavailable*, as though a witness had died or claimed the privilege against self-incrimination, and no specification of the consequences is necessary." 34 L. Ed. 2d 54, 55, 56. (Italics supplied).

Chapter I, Department of Justice (Rules Governing Judicial Administration) states:

Part 16 — Production or Disclosure of Material or Information.

Subpart B — Production or Disclosure in Response to subpoena or Demand of Courts or Other Authorities, in § 16.22 provides:

> "No employee or former employee of the Department of Justice shall, in response to a demand of a court or other authority, produce any material contained in the files of the Department or disclose any information relating to material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without prior approval of the appropriate Department official or the Attorney General in accordance with § 16.24."

§§ 16.23 and 16.24 provide procedures to follow in the

event of such demand upon an employee or former employee including the F. B. I. Code of Federal Regulations Title 28, 1973, Judicial Administration, at pages 97, 103-104.

To the same effect is § 67-16-4, Utah Code Annotated, 1953, which reads:

> "Prohibited acts — Disclosing or using confidential information — Using position to secure privileges or exemptions — Accepting employment which would impair independence of judgment. — No public officer or public employee shall:
>
> . . . . .
>
> "(2) Disclose confidential information acquired by reason of his official position nor use such information for his or another's private gain or benefit."

This brings us to a consideration of the relevant State cases.

POINT IV.

CIVIL DISCOVERY IS APPLICABLE TO CIVIL CASES ONLY AND NOT CRIMINAL CASES.

A State civil statute, or code of civil procedure, providing for discovery and inspection of evidence in the possession of an adverse party will not be made applicable to criminal cases, since they are restricted to civil actions only.

In *Bailey* v. *State*, (1957) 227 Ark. 889, 302 S. W. 2d 796, 798, cert. den. 355 U. S. 851, 2 L. Ed. 2d 59, 78 S. Ct. 77, the appellant claimed error in refusing his request to

take the deposition of the prosecution witness under the civil discovery statute. The Court held that the act in question applies only to civil cases and that the legislature so intended. This act referred to "party" or "parties." A defendant is not used. It applied to material witnesses where there are reasonable grounds he will die or become mentally or physically incapable of testifying or of becoming a non-resident of the State. "The materiality of the testimony, and the reason for taking his deposition, shall be shown by affidavit." The court held no such affidavit or showing was made by appellant. "Had the legislature intended [the civil case Act] to apply to criminal cases [as well as civil] it could easily have so declared." *Id.*, at p. 798. To the same effect is *Edens* v. *State*, (1962) 235 Ark. 178, 359 S. W. 2d 432, 433, cert. den. 371 U. S. 968, 9 L. Ed. 2d 538, 83 S. Ct. 551, wherein the Court held "The defendant was not entitled to receive copies of the statements that the Prosecuting Attorney had obtained from the various witnesses for the State, as this was a part of [his] work papers. Furthermore, we have held that the Discovery Statute . . . does not apply to criminal cases." *Id.*, at page 433. (Citing the *Bailey* case, *supra*. See also *Edens* v. *State*, (1963) 235 Ark. 996, 363 S. W. 2d 923, 925).

In *People* v. *Ratten*, (1940) 39 Cal. App. 2d 267, 102 P. 2d 1097, 1099, the claim was made that the Code of Civil Procedure permitted inspection by defendant of certain documents in the possession of the district attorney, and the Court in rejecting this contention decided that:

> ". . . It is now established in California that the sections of the Code of Civil Procedure . . . are applicable to civil actions only . . . and that . . . the

Code of Civil Procedure may not be invoked in criminal actions." *Id.*, at page 1099.

To the same effect is *People* v. *Wilkins*, (1955) 135 Cal. App. 371, 287 P. 2d 555, 559. In *Yannacone* v. *Municipal Court*, (1963) 222 Cal. App. 2d 72, 34 Cal. Rptr. 838, 839, the Court pointed out California's liberal discovery rule permits "one charged with crime may, before trial, inspect: statements of his own in possession of the prosecution, whether signed, unsigned, or on recording tapes; real evidence or reports of state officers' examination thereof; and statements of persons expected to be prosecution witnesses at trial. He may compel disclosure of the names and addresses of eyewitnesses to an alleged crime. . . . But he does have to show some better cause for inspection than a mere desire for . . . all information which has been obtained by the People in their investigation,' and such a 'blanket request' will be denied." Continuing, the Court said:

> "The statutory right to deposition in criminal cases is limited . . . The civil discovery . . . is not applicable to criminal proceedings. (Clark v. Superior Court, 190 Cal. App. 2d 739, 742, 12 Cal. Rptr. 191)." *Id.*, at page 839.

To the same effect is *People* v. *Lindsay*, (1964) 227 Cal. App. 482, 38 Cal. Rptr. 755, 773, the Court stating:

> ". . . But a defendant has to show some better cause for inspection than a mere desire for the information which has been obtained by the People in their investigation. (People v. Cooper, supra, 53 Cal. 2d p. 770, 3 Cal. Rptr. 148, 349 P. 2d 964.) Pretrial discovery in favor of a defendant is not required by due process. (Jones v. Superior Court,

> supra, 58 Cal. 2d p. 59, 22 Cal. Rptr. 879, 372 P. 2d 919.)

In *State* v. *Cocheo*, 24 Conn. Sup. 377, 190 A. 2d 916, 918 (1963), the Court held:

> ". . . The state has no power to probe the files of defense counsel and, in a fair conduct of a trial, reciprocal power cannot be granted to the accused. Our rules in civil cases . . . are not applicable in criminal cases . . ."

In *State* v. *Jeffries*, (1925) 117 Kan. 742, 232 P. 873, the defendant claimed that the provision of the Civil Code (R. S. 60-2850) authorizing an inspection or permission to take copies of books, papers, or documents that are in the possession of an adverse party was applicable in criminal cases by the provision of the Criminal Code which provides:

> "The provisions of law in civil cases relative to compelling the attendance and testimony of witnesses, their examination, the administration of oaths and affirmations, and proceedings as for contempt, to enforce the remedies and protect the rights of parties, shall extend to criminal cases so far as they are in their nature applicable thereto, subject to the provisions contained in any statute. R. S. 62-1413."

The State insisted the adoption of the Civil Procedure section R. S. 62-1413 is so restricted in its terms as to exclude the right to such inspection, and the Court in adopting this contention of the State, at pages 873-874, said:

> ". . . The court is of opinion that the adoption section does not cover or include the provision of

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the Civil Code relating to inspection. It is a general rule that the specification of certain procedural steps carried the implication that all others are excluded. The Legislature has said that the civil provisions relating to the attendance, examination, and testimony of witnesses are applicable in criminal cases, and this raises the presumption that no other kinds of evidence, such as books, papers, and documents, or steps for the inspection of or production of the same, were within the intention of the Legislature . . . The view of the court is that the clause 'to enforce the remedies and protect the rights of parties' has reference to the antecedent phrase relating to proceedings for contempt. Transposing it, the Legislature has in effect said that the rule of civil procedure shall be extended and applied to contempt proceedings brought to enforce the remedies and protect the rights of parties in criminal cases. The enumerated instances in the adoption statute it is held excludes all unspecified instances, and, since there is no right for an inspection of the letters in question except by virtue of express authorization by the Legislature, and since none has been granted in the Criminal Code either directly or by reference to the Civil Code, there was no power in the court to make the order requiring the county attorney to turn over the letters for inspection, and the order is therefore reversed."

In *State* v. *Goodman*, (1971) 207 Kan. 155, 483 P. 2d 1040, 1047, the Court cited the new Code of Criminal Procedure, effective 1970, which provided that if a prospective witness was unable to attend or prevented from attending trial or hearing to prevent failure of justice the Court upon motion of defendant after filing of information or indictment may take testimony of such witness by deposition,

but that here the witness did appear, so defendant was not prejudiced. The trial court's order sustaining the state's motion to quash the subpoena was affirmed.

In *State* v. *Jones*, (1968) 282 Kan. 31, 446 P. 2d 851, 863, it appeared that the defendant requested the county attorney to produce statements taken by police from certain witnesses, and also those of any witness not used by the state at preliminary hearing, which motion was heard and denied. The Court, at page 864, said:

". . . We think the district court did not err. The statements were not official documents, nor a part of any court record."

The Court then quoted from *State* v. *Baders*, 141 Kan. 683, 42 P. 2d 943:

"'. . . It is sufficient to say defendant was not entitled to inspect such statements. They were in in no sense public records and amounted to no more than memoranda the county attorney might have made of what the witnesses told him. See State v. Laird, 79 Kan. 681, 100 P. 637; State v. Jeffries, 117 Kan. 742, 232 P. 873; State v. Furthmyer, 128 Kan. 317, 277 P. 1019; State v. Hooper, 140 Kan. 481, 482, 37 P. 2d 52.'"

In *State* v. *Corkran*, (1965) 3 Ohio St. 2d 125, 209 N. E. 2d 437, the defendant asserted that the trial court erred in overruling his motion to require the prosecuting attorney to allow him to examine a statement in the possession of the prosecution, relying upon a statute (Section 2317-33, Revised Code) entitled "Evidence" which reads in part:

> "Either party, or his attorney, in writing, may demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper, or document in his possession or under his control, containing evidence relating to the merits of the action or defense . . ." (*Id.*, at page 439)

which the defendant claimed was applicable to a criminal case since it provides:

> "The rules of evidence in civil cases, where applicable, govern in all criminal causes."

The Court held that the statutes in issue did not "apply to criminal cases" and by "its very verbiage it would seem apparent that Section 2317.33, Revised Code, was not designed or intended to apply to criminal cases." Citing and considering applicable cases. *Id.*, at page 440.

In *State* v. *Fox*, (1961), 122 Vt. 251, 255, 169 A. 2d 356, 359, the defendant asserted that

> ". . . there is no sound reason why the Legislature would make provision for the fullest discovery in civil actions and withhold the remedy in criminal prosecutions. It is suggested that the intention of the Legislature is better served by expanding the operation of 12 V. S. A. § 1262 to criminal causes. *The same considerations attended the deliberations of the Advisory Committee in the adoption of the Federal Rules of Criminal Procedure and was particularly avoided.*
>
> . . . . .
>
> "The broad construction sought by the respondent may be desirable, but this is not the controlling factor. It is not the function of the courts

> to expand the intention of the Legislature beyond the terms of the act itself." (Italics supplied.)

In *State ex rel. Keast* v. *District Court*, 135 Mont. 545, 342 P. 2d 1071 (1959), an original prohibition proceeding was instituted by a county attorney for a writ of prohibition to prevent a defendant from obtaining inspection of writing material in a criminal case by civil discovery. The respondent contended the district court had inherent power to order th inspection. The Court, in making the writ absolute, denied respondent's arguments that civil discovery applied to criminal cases relying on *State ex rel. Mahoney* v. *Superior Court*, 78 Ariz. 74, 275 P. 2d 887, 890; and *Walker* v. *People*, 126 Colo. 135, 248 P. 2d 287, 302, wherein, in the latter case, the court stated: "The doctrine of discovery is therefore a complete and utter stranger to criminal procedure, unless introduced by appropriate legislation."

POINT V.

THE BURDEN OF SHOWING "GOOD CAUSE" FOR INSPECTION OR DESIGNATING SPECIFIC EVIDENCE HAS NOT BEEN MET IN THIS CASE, AS ALREADY SHOWN, OR BY STATE LAW.

The State cases declare that it is imperative that in order to obtain an inspection of evidence in the possession of the prosecution, there must be a proper showing of "*good cause*" by stating the purpose for which the inspection is sought, its relevancy, materiality, facts justifying inspection and why it should be allowed.

It is clear that some better cause for inspection must be shown than *a mere desire for all information* which has been obtained by the prosecution in its investigation of the crime.

People v. *Terry*, 57 Cal. 2d 538, 21 Cal. Rptr. 185, 370 P. 2d 985, 999, cert. den. 375 U. S. 960, 11 L. Ed. 2d 318, 84 S. Ct. 446 (1962); *People* v. *Newville*, 220 Cal. App. 2d 267, 33 Cal. Rptr. 816, 819 (1963); *State ex rel. Keast* v. *District Court*, 135 Mont. 545, 342 P. 2d 1071, 1073 (1959); *Rosier* v. *People*, 126 Colo. 82, 247 P. 2d 448, 451-453 (1952).

The production of the prosecution's evidence is not allowed for *exploratory purposes or for the purpose of prying into the prosecution's preparation for trial.*

State v. *Aubuchon*, (1964 Mo.), 381 S. W. 2d 807, 813-815; *People* v. *Calandrillo*, (1961) 29 Misc. 2d 491, 215 N. Y. S. 2d 361, 363.

There is no right to invoke the means of examining the prosecution's evidence *merely in the hope that something may turn up to aid a defendant.*

State v. *Wallace*, (1965) 97 Ariz. 296, 399 P. 2d 909; *Walker* v. *Superior Court*, (1957) 155 Cal. App. 2d 134, 317 P. 2d 130; *State* v. *Stump*, (1963) 254 Iowa 1181, 119 N. W. 2d 210, cert. den. 375 U. S. 853, 11 L. Ed. 2d 80, 84 S. Ct. 113; *State ex rel. Keast* v. *District Court*, (1959) 135 Mont. 545, 342 P. 2d 1071; *Linder* v. *State*, (1953) 156 Neb. 504, 56 N. W. 2d 734; *People* v. *Leahey*, (1960) 26 Misc. 2d 438, 207 N. Y. S. 2d 619; *People* v. *Marshall*, (1958) 6 N. Y. 2d 823, 188 N. Y. S. 2d 213, 159 N. E. 2d 698; *State* v. *Goldberg*, (1964) 261 N. C. 181, 134 S. E. 2d

334, cert. den. 377 U. S. 978, 12 L. Ed. 2d 747, 84 S. Ct. 1884; *Melchor* v. *State*, (1965 Okla. Crim.) 404 P. 2d 63; *State* v. *Gilliam*, (Mo.) 351 S. W. 2d 723, (1961) cert. den. 376 U. S. 914, 11 L. Ed. 2d 612, 84 S. Ct. 670; *State* v. *Hale*, (Mo. 1963) 371 S. W. 2d 249; *State* v. *Richette*, 342 Mo. 1015, 119 S. W. 2d 330 (1938); *People* v. *Martinez*, 15 Misc. 2d 821, 183 N. Y. S. 2d 588 (1959); *Anderson* v. *State*, 207 Tenn. 486, 341 S. W. 2d 385 (1960); *State* v. *Lee*, 173 La. 966, 139 So. 302 (1932); *State* v. *Brown*, 360 Mo. 104, 227 S. W. 2d 646 (1950); *People* v. *Marshall*, 6 N. Y. 2d 823, 188 N. Y. S. 2d 213, 159 N. E. 2d 698 (1959).

In fact, a "blanket request" for prosecution's evidence will not be granted, where it is a mere desire for all information which has been obtained by the prosecution in its investigation of a crime. *People* v. *Cooper*, 53 Cal. 2d 755, 770, 3 Cal. Rptr. 148, 157 (1960); *Yannacone* v. *Municipal Court*, (1963) 222 Cal. App. 2d 72, 34 Cal. Rptr. 838, 839.

The motion for production of the prosecution's evidence *must be based on facts and not on conclusions; State* v. *Tune*, (1953) 13 N. J. 203, 98 A. 2d 881; *or mere surmise* and *conjecture, People* v. *Gatti*, (1938) 167 Misc. 545, 4 N. Y. S. 2d 130; or where the subpoena *duces tecum* is primarily *an attempt to go on a "fishing expedition," probably to obtain the "work product" of the prosecution. State* v. *Colvin*, (1957) 81 Ariz. 388, 307 P. 2d 98.

POINT VI.

PROSECUTING ATTORNEY'S NOTES, MEMORANDA, FILE OR "WORK PRODUCT" ARE NOT SUBJECT TO DISCOVERY PROCEDURE.

An accused is not entitled to inspect the notes or memoranda made by the prosecuting attorney or his representative in the preparation of the case.

People v. *Bermis*, (1935) 2 Cal. 2d 270, 40 P. 2d 823; *People* v. *Cathey*, (1960) 186 Cal. App. 2d 217, 8 Cal. Rptr. 694; *Hopper* v. *People*, (1963) 152 Colo. 405, 382 P. 2d 540; *Campbell* v. *United States*, (1961 Mun. Ct. App. Dist. Col.) 174 A. 2d 87; *State* v. *Kelton*, (1957 Mo.) 299 S. W. 2d 493; *State* v. *Superior Court*, (1965, N. H.) 208 A. 2d 832; *Brown* v. *Commonwealth*, (1894) 90 Va. 671, 19 S. E. 447; *State ex rel. Regan* v. *Superior Court*, (1959) 102 N. H. 224, 226, 227, 230, 153 A. 2d 403 (*notes made on behalf of Attorney General or his staff* "privileged from discovery even under the rule in civil cases"); *State ex rel. McLetchie* v. *Laconia District Court*, (1964, N. H.) 205 A. 2d 534; *Edens* v. *State*, (1962) 235 Ark. 178, 359 S. W. 2d 432, cert. den. 371 U. S. 968, 9 L. Ed. 2d 538, 83 S. Ct. 551; *State* v. *Marzbanian*, (1963) 2 Conn. Cir. 312, 192 A. 2d 721, cert. den. 197 A. 2d 944; *Peel* v. *State*, (1963, Fla. App.) 154 So. 2d 910; *People* v. *Murphy*, (1952) 412 Ill. 458, 107 N. E. 2d 748, cert. den. 344 U. S. 899, 97 L. Ed. 695, 73 S. Ct. 281, cert. den. 350 U. S. 865, 100 L. Ed. 767, 76 S. Ct. 108; *Anderson* v. *State*, (1959) 239 Ind. 372, 156 N. E. 2d 384; *State* v. *Furthmyer*, (1929) 128 Kan. 317, 277 P. 1019; *State* v. *Hill*, (1964) 193 Kan. 512, 394 P. 2d 106; *State* v. *Tune*, (1953) 13 N. J. 203, 98 A. 2d 881; *State* v. *Bunk*, (1949 N. J. County Ct.), 63 A. 2d 842; *People* v. *Giles*, (1961) 31 Misc. 2d 354, 220 N. Y. S. 2d 905.

The "work product" of the prosecuting attorney is not producable for inspection by the defense. *State* v. *Colvin*, (1957) 81 Ariz. 388, 307 P. 2d 98; *State* v. *Zimmaruck*,

(1941) 128 Conn. 124, 20 A. 2d 613; *State* v. *Roy*, (1962) 23 Conn. Sup. 342, 183 A. 2d 291; *State* v. *Salvatore*, (1962) 23 Conn. Sup. 459, 184 A. 2d 551; *Fuller* v. *United States*, (1949, Mun. Ct. App. Dist. Col.) 65 A. 2d 589; *McAden* v. *State*, (1945) 155 Fla. 523, 21 So. 2d 33, cert. den. 326 U. S. 723, 90 L. Ed. 429, 66 S. Ct. 28; *Johns* v. *State*, (1946) 157 Fla. 18, 24 So. 2d 708; *Raulerson* v. *State*, (1958 Fla.) 102 So. 2d 281; *Urga* v. *State*, (1958, Fla. App.) 104 So. 2d 43; *Bedami* v. *State*, (1959, Fla. App.) 112 So. 2d 284, cert. den. 361 U. S. 883, 4 L. Ed. 2d 119, 80 S. Ct. 153; *Jackman* v. *State*, (1962, Fla. App.) 140 So. 2d 627; *State* v. *Laird*, (1909) 79 Kan. 681, 100 P. 637; *State* v. *Williams*, (1947) 211 La. 782, 30 So. 2d 834; *State* v. *Haddad*, (1952) 221 La. 337, 59 So. 2d 411; *State* v. *Aubuchon*, (1964, Mo.) 381 S. W. 2d 807; *Dinsmore* v. *State*, (1901) 61 Neb. 418, 85 N. W. 445; *Erving and Howard* v. *State*, (1962) 174 Neb. 90, 116 N. W. 2d 7, cert. den. *Howard* v. *State*, 375 U. S. 876, 11 L. Ed. 2d 121, 84 S. Ct. 151; *People* v. *Marshall*, (1958) 5 App. Div. 2d 352, 172 N. Y. S. 2d 237, affd. 6 N. Y. 2d 823, 188 N. Y. S. 2d 213, 159 N. E. 2d 698; *State* v *Miller*, (1961 App.) 88 Ohio L. Abs. 533, 176 N. E. 2d 296, app. dismd. 172 Ohio St. 554, 18 Ohio Ops. 2d 93, 179 N. E. 2d 53.

POINT VII.

IT IS NOW CLEAR THAT NEITHER THE FEDERAL NOR THE STATE COURTS WILL COMPEL BY CIVIL DISCOVERY METHOD THE DISCLOSURE OF MATERIAL FORMING THE BASIS OF CRIMINAL PROSECUTION.

In *Redmond* v. *City Court of Salt Lake City*, 17 Utah 2d 95, 404 P. 2d 964 (1965), *a petition for mandamus* was filed to require a county attorney to produce checks so that defendants, in a criminal prosecution, by handwriting experts might depend on preliminary examination by showing that they had not written and endorsed the checks, the subject of the particular charge. The court below refused the discovery. Chief Justice Henriod, in affirming the action of the lower court, at 17 Utah 2d at 95-96, 404 P. 2d at 964, said:

> ". . . We also feel that the district court was right in deciding that under our statutes and the cases, there was not an abuse of discretion, nor a denial of due process by the city court as reflected in the record before us, and that the district court did not err either, in refusing to order the county attorney to do so."

Section 105-21-9(1) U. C. A. 1943, (now § 77-29-9, U. C. A. 1953), authorizing a bill of particulars "was not intended as a device to compel the prosecution to give an accused a preview of the evidence on which the state relies to sustain the charge." *State* v. *Stack*, 118 Utah 128, 134, 221 P. 2d 852 (1950).

In *State* v. *Martinez*, 21 Utah 2d 187, 442 P. 2d 943 (1968), the defendant sought disclosure of the prosecution's evidence which the trial court refused to order. Mr. Justice Henriod, in declaring this was not errer, at page 188, in disposing of this claim of disclosure, said:

> ". . . that the court [had not] erred in not requiring disclosure of the prosecution's evidence, which was an all-inclusive and unreasonable dis-

> closure demand fraught with dangerous adversary procedural implication if the request had been granted."

Citing the often referred to case of *United States* v. *Garsson*, 291 F. 646 (D. C. S. C., N. Y. 1923) in which Judge Learned Hand profoundly stated at page 649:

> ". . . Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."

CONCLUSION

In the light of the statutory and decisional law hereinbefore considered it is imperative that the prayer of the State of Utah in this petition be granted by this Court issuing a writ of mandamus or prohibition in the interests of justice, public policy and valid administration of justice as determined by law.

It is to be observed that the State is merely requesting that the civil case, now pending in the court below, be held in abeyance until the related State criminal proceeding, now in the process of prosecution, is finally terminated. The State is not asserting here its right and power of privilege which it can do, by refusing to divulge the results of its investigation of any criminal violations resulting therefrom.

The use of the civil discovery subpoena *duces tecum* in question shows on its face that it is nothing more than a "blanket request" or a "fishing expedition" or a "backdoor" or "cover-up" or "as a dodge" to avoid the restrictions of criminal discovery in an "attempt to obtain a wholesale disclosure of material favorable on the question of guilt."

There is no showing of "*good faith*" as required by law. The subpoena *duces tecum* is merely an attempt to subvert civil discovery into a device for obtaining pre-trial discovery against the State in its related criminal proceeding.

The action taken by the defendant Judge in denying the motion for the delay of the civil proceedings constituted an abuse of his judicial power as shown by the Transcript of Record, at page 11, Judge Ritter stating in open court as follows:

> ". . . The F. B. I. agents were running the D. A.'s in those days. The F. B. I. agent came in and said what they would do and wouldn't do, and he came in and took that witness stand and said he was going to disclose nothing. So I promptly made an order that he disclose his entire investigation. And I have been doing that ever since."

Continuing, at page 12, he stated:

> ". . . I require that sort of thing in civil cases. I require the F. B. I. to produce and I require the Attorney General of the United States to produce. I require the D. A. to produce. It is everyday, common practice in this courtroom now that every criminal defendant is given the whole file right at the start. I don't have to make a ruling on each case any more. That is the practice we have established. That will be the ruling. If you have some problem, why, I am here and you can come in and we will see what we can do about it."

Intervention here would expose every State criminal prosecution to insupportable disruption. The Federal Courts have recognized the wisdom of staying cases pending determination of related actions in State Courts. Federal Courts follow a procedure aimed at the avoidance of unnecessary interference by such courts with proper and validly administered state concerns, a course so essential to the balanced working of our Federal system, so as to minimize the possibility of such interference; and a scrupulous regard for the rightful independence of state governments, should at all times actuate Federal Courts.

Respectfully submitted,

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May, 1974

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I hesitate to use the word "Watergate" because it's a term now used to describe conduct often no more serious than a public official getting picked up for reckless driving. But where Nixon's Watergate was a conspiracy within the executive branch of Government, Ritter's judicial Watergate is simply a conspiracy of silence among Utah lawyers, journalists, and public officials, who do little or nothing, while a man who never should have been a judge in the first place continues to rule Utah's Federal judicial system.

No one is above the law. Lawyers, even more than citizens in general, ought to act legally. Judges, even more than attorneys, should obey the law and ethical standards.

Senator BURDICK. Thank you very much.

Essentially all of your statements seem to be directed against the conduct of Judge Ritter, which would apply to him as a sitting judge, as well as a chief judge.

Mr. HANSEN. That's true, Senator Burdick. We can do, in the passage of this bill—only correct a very minor part of the problem and we really should be before the House Judiciary Committee on Impeachment Hearings.

Senator BURDICK. Because I say that's out of our jurisdiction.

Mr. HANSEN. It may be out of your jurisdiction, Senator, but at least what you can do, we respectfully submit, you should do.

Senator BURDICK. We'll do what we can properly do, of course. That's the purpose of this committee.

Senator GARN. Mr. Chairman, before the next witness comes up, could I make just one brief response to this point of Mr. Westphal? I realize I'm not still there as a witness, but very briefly?

Senator BURDICK. Certainly. Just a minute. I have some questions of this witness.

Senator GARN. I recognize the legal technicalities and what Mr. Westphal is trying to point out and to narrow this. I have only been a Senator for 17 months, but I have sat through dozens and dozens and hundreds of committee hearings.

And I have seen other committees take wide-ranging testimony. We are not the judicial branch; we are the legislative branch. And in considering legislation in all of the committees I serve on we've been willing to listen to any information that would help us make a decision on that particular bill.

Maybe because all of the members of this committee are attorneys there is more of a tendency to go to legal technicalities and to look at only evidence directly pertaining. I can understand that feeling.

But I would like to point out that this is the legislative body. And I would like to point out that were I a Member of the House of Representatives, I would be attempting to have Judge Ritter impeached on the evidence that is being presented. But I do feel, as a Senator, and as fellow Senators considering this, that it is pertinent. You can play the attorney game and narrowly define it and exclude all of this and say it isn't important. But this isn't a court. It's a subcommittee of the U.S. Senate.

And I would hope the committee would take into consideration the abuses being heaped and, as the Deputy Attorney General just said, maybe on a scale of 10 this bill only corrects 10 percent, but that would be a help to the people of Utah and to the judicial system.

And I would hope you would not summarily define it and you would consider his decisions, his temperament, his abuse of the judicial system as a sitting judge, and do something for the people of Utah. Thank you.

Senator BURDICK. Just a minute, Senator. We've excluded no testimony. We've excluded no witnesses. We're not confining a single thing. We made no determination. We're simply pointing out that there are certain areas we have no power over. That's all we were doing.

Senator GARN. Senator, I completely agree and you have been willing to listen to any testimony, but in Mr.——

Senator BURDICK. And we don't exclude anybody.

Senator GARN [continuing]. Westphal's line of questioning, I sit here and think that when the decision is made, that although it was listened to——

Senator BURDICK. The Committee will determine from all that is before us.

Senator GARN [continuing]. It would be excluded. Thank you.

Senator BURDICK. Now, you say, Mr. Hansen, that you have taken several opinion polls and I think in several cities. And these show that people aren't satisfied with—what's the word you used?—"biased," occasionally biased. Do you really think this Committee should take into consideration opinion polls?

Mr. HANSEN. Well, to the extent that it is pertinent as to whether or not Utah needs any special justification over and above the consideration given to all other States, that they have a chief judge under the age of 70, then I think that all factors that have a bearing on whether or not he performs well as chief judge ought to be considered.

And I would think that the members of the Utah State Bar, as a collective judgment, rather than just a few perhaps disgruntled ones who have lost a case in his court, provide very significant evidence as to what their judgment is as to how well he does perform, because after all, the courts are there to serve the people. And those who are in the best position to judge the court's performance, I think, are the attorneys who practice before the court, because that poll consists not only of those attorneys who dislike Judge Ritter, but also those who do like him very much.

Senator BURDICK. You and I are both lawyers.

Mr. HANSEN. Yes, sir.

Senator BURDICK. Do you use opinion polls in your prosecution of cases?

Mr. HANSEN. No; not in prosecution cases, but there are cases, of course, where public sentiment does have a bearing and I think in the field of legislation is one area where I think that does have a proper role.

Senator BURDICK. Well, this Committee wants evidence.

Mr. HANSEN. We're here to try to provide what information we have, Senator.

Senator BURDICK. Just one question. You say that 39 applications for writs and 8 were granted. In other words, the judge prevailed 80 percent of the time on that score?

Mr. HANSEN. Well, three-fourths of the time he did, Your Honor, yes.

Senator BURDICK. Well, 8 is to 39 whatever it is—three-fourths.

Mr. HANSEN. Well, 39 was the number filed. 8 percent were those granted.

Senator BURDICK. Is that bad?

Mr. HANSEN. Well, that's a pretty good batting average, if you want to look at it in the abstract. But that's why I compared it to the other judge in respect to the percentage and I didn't have that on the chart. But we have produced the figures that writs are granted against him on an average of about three times as often as they are against any other judge. So I think that what you have to do is not consider that figure in the abstract, because that's an extraordinary remedy before a trial for an appellate court to say that the judge has so conducted himself that he ought not to preside as the judge over that trial. That's a pretty extreme remedy and it is very rarely granted.

But I might say that five of those special writs have been filed by the United States Government since Judge Ritter became over the age of 70; three have been filed by the State of Utah; I think two by Salt Lake City. The large percentage of the others are major corporations of this country and other leading citizens.

So I think if you looked into that, you'd see that these weren't writs that were filed by some tax protester or fringe litigant. They were filed by very substantial counsel and for very good cause.

Senator BURDICK. I think Mr. Westphal has just one question.

Mr. WESTPHAL. I just have one question, Mr. Hansen. You mentioned that he has been reversed some 54 percent of the time or something of that kind. If this bill passes and he didn't have the word "Chief" to describe his position as the judge, do you think that would have any bearing on his reversal rate?

Mr. HANSEN. No. I think a judge that is as bright as Judge Ritter is—and even his critics concede that he is a very brilliant man—and as a result, you have to attribute those 54 percent reversals not to the fact that he doesn't know what the law is, but that he refuses to follow the law.

And, therefore, I think it's even worse for a judge to have the stature and the power of a chief judge who isn't even an adequate judge.

Mr. WESTPHAL. It seems to me that's a question for the House of Representatives and not for the Senate initially.

Mr. HANSEN. I hope we'll have a chance to present that some day. It has been difficult enough getting the bill to the point that this bill is now. And as I mentioned at the outset of my statement, this is a mild slap at a judge that should get a knockout punch.

Mr. WESTPHAL. I have no further questions.

Senator BURDICK. Thank you very much.

Our next witness is Mr. William J. Lockhart, Salt Lake City, Utah. Welcome to the Committee.

Mr. LOCKHART. Good morning, Senator. I guess it's still morning. I appreciate the opportunity to appear here to oppose S. 1130. I have submitted a statement and I propose to omit reading the first portion of the statement.

Senator BURDICK. Your entire statement will be made part of the record, without objection.

Mr. LOCKHART. Thank you.

[The above referred to statement follows:]

SALT LAKE CITY, UTAH, *May 13, 1976.*

Re May 18, 1976, hearing on S. 1130.

Hon. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, Senate Committee on the Judiciary, U.S. Senate, Senate Office Building, Washington, D.C.

DEAR SENATOR BURDICK: This statement is submitted in response to your invitation by your letter of May 6, inviting my comment and testimony on S. 1130.

Because this bill is designed and intended to impose a special sanction upon Chief Judge Willis W. Ritter, United States District Court for the District of Utah, it is obviously of some concern to you to know my associations with the State and with Judge Ritter. Please allow me to make clear that this description of my background is simply for the committee's information. I speak only on my own behalf and not for any of the institutions or associations with which I am or have been affiliated.

I have been a resident of the State of Utah since July, 1964, when I moved my family to Salt Lake City to accept an appointment at the College of Law, University of Utah, where I am now a Professor of Law, teaching Administrative Law, Federal Courts and Constitutional Law. Beginning in approximately 1967 I first was admitted to practice before the United States District Court for the District of Utah and appeared before Judge Ritter as appointed counsel in a habeas corpus matter. Since that time, I have appeared before him on several occasions in civil liberties or Indian matters. As the former director of the legal panel and president of the Utah Affiliate of the American Civil Liberties Union, I had occasion to be familiar with Judge Ritter's handling of litigation of interest to the ACLU.

On November 22, 1974, following the accidental death of the then U.S. Attorney, Mr. C. Nelson Day, Judge Ritter exercised his statutory power to appoint me as interim United States Attorney pending presidential appointment and confirmation of a successor. I remained in that office until May 5, 1975, and was succeeded by Mr. Ramon Child.

On two occasions I have represented Chief Judge Ritter in connection with mandamus and other actions before the Court of Appeals for the Tenth Circuit arising out of his duties as a district judge, once as private counsel (without fee), and once in the course of my official duties as United States Attorney. In none of the cases in which I have appeared before Judge Ritter did I ever personally receive a fee for my legal services, though on one occasion I did recover a statutory attorney fee in a fair housing case which, by prearrangement was contributed to the minority scholarship fund of the College of Law. I have no cases, and have not had since leaving the United States Attorneys office, in Judge Ritter's Court.

The background of my appointment by Judge Ritter as United States Attorney may be of some interest to the Committee. A year prior to my appointment I had been conducting independent research in Washington, D.C., studying the problems of exercise and control of prosecutorial discretion. Since returning from Washington, I had pursued further research and had been preparing a report of my work, which focussed heavily upon the relationship between the federal enforcement agencies and the role of the United States Attorneys in prosecuting cases on behalf of those agencies. When it became apparent that the vacancy in the United States Attorneys Office would be filled by interim appointment, certain friends aware of my research interests advised Judge Ritter that my experience and interest might suit me for the task. At his invitation, then, I gratefully accepted the opportunity for first-hand experience in the exercise of prosecutorial discretion, and have recently prepared an article on the problems of prosecutorial discretion, as they affected the President's Clemency Program which I administered for the District of Utah.

With that background, let me state my view of S. 1130.

I view this bill as a heavy-handed and poorly-disguised effort to use the United States Senate as a political forum for certain elements of the Utah political spectrum who wish to strike back at a federal Judge who has generally been recognized as a stout protector of civil rights and civil liberties in Utah. It is not irrelevant that the chief proponent of this political slap at a sitting federal judge has been posturing for political office ever since he began this harassment program more than two years ago, and is now a candidate for State Attorney General.

The politically-motivated nature of this proposal is clearly revealed by the irrelevancy of the arguments offered in its support. Although the proposal is

designed solely to strip Judge Ritter of his title of Chief Judge by repealing a narrow grandfather clause, virtually none of the arguments bandied about in Utah have anything to do with the functions of Chief Judge.

The main function likely to provoke dispute about the powers of a Chief Judge—the assignment of cases—was long ago dealt with in the District of Utah by an assignment rule which leaves virtually no assignment powers to the Chief Judge. And that assignment rule also dispenses with most of the problems of judicial administration of the caseload, because the assignment rule leaves management of the cases in the lap of the judge to whom the cases are originally assigned. Thus, the main remaining authority of the office of Chief Judge—the ministerial administration of the Court—is a matter to which little, if any, public argument has been addressed.

If there are any credible complaints about the operation of the clerk's office, they have not been advanced in Utah. The only complaint of that kind has been the intemperate and grandiose series of complaints and charges by Mr. Julius Petrofsky, which on inquiry were rejected by the ACLU. (After my tenure with ACLU.)

No complaints have been made about the only other major areas of administration: the Bankruptcy Court and Probation Office. Both offices are generally acknowledged by the Bar to be extremely effective.

Beyond these observations, it is difficult to respond factually because none of the purported factual basis for complaint relating to performance of the functions of Chief Judge has been discussed by the proponents.

What it comes down to, then, is that the proponents of this Bill seek to use the forum of the United States Senate as a launching platform for political chastisement of a federal judge. By urging enactment of this Bill they hope to punish him for attitudes or for constitutional and legal positions that have no significant relevance to the role of Chief Judge of which they hope to strip him. Even assuming the full good faith of the complaints addressed to Judge Ritter, they concern his role as an independent federal judge. His status as Chief Judge is simply irrelevant.

The manner in which this proposal has been promoted, first before the assembled State Bar Association in Utah, and now before this Committee, reveals its real purpose. The proponents of the State Bar resolution concerning this Bill have acknowledged that their primary motive was to redress what they claim to be the Judge's irascibility or lack of adequate judicial decorum. But there has never been any effort by the proponents to seek quiet and amicable resolution of any differences they may have with the Judge arising out of particular cases. So far as I know, none of the proponents have ever sought the assistance of the Bar leadership by proffering detailed examples of their complaints and seeking the assistance of the Bar leadership to resolve any complaints. Rather, the proponents have sought at every turn to place these disputes in the public forum and gain maximum publicity for their efforts at confrontation—and this committee is merely the latest forum.

There is no question that Judge Ritter has been a controversial judge, and I think he would agree to be characterized as sometimes crotchety. It is clear that he does not tolerate fools gladly in his courtroom, and often assists them in recognizing their identity. He tends to make prosecutors turn square corners and narrowly limits their latitude because of this personal and substantive perceptions of the dangers to liberty of the largely uncontrolled powers vested in the prosecutor. During my tenure in the office of United States Attorney, I certainly felt in some instances that the Judge too narrowly limited the scope of appropriate examination, and sometimes set schedules that put our preparation to the test.

But the proper way to deal with these conflicts is to recognize that our legal system is designed to accommodate and resolve the inevitable conflicts between the administrative and judicial branches. Thus, the present United States Attorney has quite properly set out through the established legal process to contest the Judge's restrictive view of the appropriate role of the Grand Jury. There is reason for the prosecutor to be concerned about his need for the investigative and charging powers of the Grand Jury. But there is equally good reason for a responsible judge to be concerned about the prosecutor's easy control of the Grand Jury or the possible misuse of grants of immunity.

These inevitable conflicts arise from a problem on which there is a reasonable basis for difference of opinion—including possible legal error by the judge as well as by the prosecutor. So long as efforts to resolve these inevitable conflicts remain within the legal process, strongly-held viewpoints will be expected, but the issues will be resolved on principle and without damage to our institutions.

But when politicians begin to suggest the use of political instruments to punish or chastise federal judges, constitutionalists are obligated to speak out for the independence of the federal judiciary.

It is not necessary to resolve the uncertain question whether this Bill is a Bill of Attainder. It is sufficient to recognize that the underlying policy of that Constitutional prohibition is especially offended by selective legislative sanctions aimed at a single, identified federal judge. In this instance, the distasteful aura of legislative condemnation of an individual without trial would be seriously magnified by the dangerous legislative precedent set. If this Bill is approved, it becomes fair game for Senators who conceive themselves to have serious philosophic or personal differences with a Federal Judge to develop imaginative legislative sanctions to strip their target of various prerequisites of office. The only difference is that in this instance no imagination was needed because Judge Ritter is the last of a legislatively-defined class, permitting easy targeting of the sanction by a simple repealer.

Nor does it seem to bother the proponents of this Bill that this legislative "trial" of Judge Ritter should take place without any notice of the "charges," without opportunity to know and respond to the supporting "evidence," and with their maximum efforts to gain public spotlight through the hearings. Thus, the sponsor of this Bill broadly reported these hearings to the people of Utah in terms which made clear that the Bill is aimed personally at Judge Ritter.

The great irony of this publicity-seeking effort, however, is that in the very next column of the same Newsletter, the sponsor glowingly depicted the protections for the Federal judiciary in the Judicial Tenure Act (S. 1110) of which he is a co-sponsor. I would like briefly to quote the principle which Senator Garn lauds so highly, but apparently prefers to honor only in the breach:

"Throughout this process, there are safeguards to protect against any abuse. Any judge, who is subject to inquiries, would be accorded all rights of due process including the right of appeal to the Supreme Court. All document filed with and testimony taken by either the Council on Judicial Tenure or the Judicial Conference would be confidential."

It seems to me that the Senator who sponsors S. 1130 ought to have a long heart-to-heart talk with the Senator who is the co-sponsor of S. 1110.

Finally, while perhaps not raising a matter of such overarching principle, it seems to me that this Committee should be concerned with the wisdom of any precedent permitting the withdrawal from prior commitment to a Grandfather Clause on the basis of a single senator's personal feud.

That this would be the impact of this Bill is clear. I have previously summarized the legislative history of the Grandfather Clause in a letter to Chairman Burdick on January 27. Please permit me to quote a brief synopsis of that legislative history from my earlier letter:

"The Grandfather Clause section was originally enacted to permit chief judges, in districts with two judges, to retain their office as chief judge after reaching the age of 70. Pursuant to attrition and the application of the general provisions of 28 U.S.C § 136, it is my understanding that Chief Judge Ritter is the only remaining judge to benefit by the Grandfather Clause.

"The purpose of the Grandfather clause was explained by Senator Eastland at page 15250 of the Congresisonal Record of July 28, 1958. (Marked and identified with a paper clip on attached material.) It reorganized that the burden of administrative duties of a Chief Judge in a two-judge district is not so heavy as to require relinquishment of office by those sitting Chief Judges."

None of the elements of the commitment made by that earlier Grandfather Clause have changed, and many of the participants in that original decision are still in the Senate. The proponents of this Bill do not even pretend to urge any claim of principle or general national policy requiring modification of the provision in the National interest. Rather, they urge that the Senate's earlier commitment be withdrawn on the basis of a single parochial dispute. That sort of chameleon image could not promote confidence in future legislative compromises.

I will be happy to respond to any questions.

Very truly yours,

WILLIAM J. LOCKHART.

JUDICIAL TENURE ACT

The United States Judicial system is the finest in the world. Much of the credit for the success of the system belongs to those judges and justices who

meet and maintain the highest quality of judicial excellence. However, no judge can be assumed perfect. Abuse of power, corruption and disability occur in all branches of government. When a judge fails to live up to the degree of excellence required of him, or if he becomes physically or mentally unable to sit on the bench, impeachment is the only recourse. Besides being a long, involved procedure, extremely difficult to complete, impeachment is often too harsh a remedy, causing humiliation and loss of benefits. Therefore, I have joined in sponsoring the Judicial Tenure Act, a bill which provides a wise and acceptable plan under which members of the Federal judiciary may be removed from office without the agony of impeachment.

The bill would establish a Council on Judicial Tenure which would be composed of judges elected by their fellow judges from each circuit. A panel of the Council would receive and investigate any written claims of misconduct or disability of a judge. They could either dismiss the complaint or report it to the Judicial Conference of the United States along with their recommendation. The Judicial Conference, or a nine-member committee of the Conference, would then sit as a Federal court to decide the case by dismissing the complaint, censuring the judge, or removing him from office. A judge could also be involuntarily retired if a mental or physical disability were seriously interfering with his performance. Throughout this process, there are safeguards to protect against any abuse. Any judge, who is subject to inquiries, would be accorded all rights of due process, including the right of appeal to the Supreme Court. All documents filed with and testimony taken by either the Council on Judicial Tenure or the Judicial Conference would be confidential.

A judge would never be referred to the Judicial Conference for being controversial. It is the intemperate, incompetent, physically or mentally incapable judge, whose judgeship is an abuse of the Judicial system, that would be affected by this legislation.

South Korean Trip

During the Christmas congressional recess I visited South Korea as the guest of the Korea-United States Economic Council. The purpose of the trip was to study South Korea—its economy, defense posture and attitude toward the United States.

South Korea has been likened to Viet Nam, a comparison I found to be totally erroneous. Economic strength, a feeling of independence and a desire to retain freedom pervades the country. Unlike South Vietnam, South Koreans are anti-Communist. Even opponents of the present administration oppose Communism. South Koreans would stay in their Country and fight Communist aggressors.

Currently there is no imminent threat of attack from the North. South Korean defenses are strong, the troops are well trained and the country's weapon production capabilities are increasing. An equally strong deterrent to war is the presence of American troops in South Korea. Our attitude of defense against Communism and our solidarity in maintaining support for South Korea provides the security the country needs to continue to progress. It is in our self-interest as well as theirs that they remain free.

Chief Judge Hearings

Over a year ago, I introduced Senate Bill 1130 to remove the chief judgeship "grandfather clause" and require all Federal district court judges to surrender their chief judgeship at age 70. At the end of March, a commitment was made by a Judiciary Subcommittee chairman that hearings on the bill will be held in the near future. While others have, in the past, introduced similar legislation, none of the bills has reached the hearing stage.

The only court in the United States that is affected by the grandfather clause is the U.S. District Court for the District of Utah. This legislation would remove Judge Willis Ritter's chief judgeship. He would, unfortunately, be able to continue to serve on the bench but he would not be able to assign cases or otherwise function as chief judge.

With hearings scheduled this spring, the United States Judicial Conference, people from the Justice Department, representatives of the Utah State Bar and others will finally be given their day in court to testify on why this bill should be passed and the chief judgeship taken from Judge Ritter.

Utah Day

Millions of people are expected to visit Washington, D.C. this summer. To avoid the crowds, you may wish to schedule your Bicentennial vacation around Utah Day, November 12. Utah Day is a day which the District of Columbia has set aside to honor Utahns and their contributions to the United States. A special ceremony with D.C. Mayor Walter Washington, Governor Calvin Rampton and members of the Utah delegation is planned. Also on the agenda is a congressional luncheon, a program by D.C. school children and a musical salute to Utah in the Kennedy Center. The Utah Bicentennial Commission or the Governor's office can supply further details concerning Utah Day.

STATEMENT OF WILLIAM J. LOCKHART, SALT LAKE CITY

Mr. Lockhart. I would like, then, simply to begin by stating that my main objection to this bill is that it appears to me to be a heavy-handed, irrelevant, poorly disguised political effort to use the U.S. Senate or this committee as a forum for some elements of the political spectrum in Utah who wish to strike back at a judge who has generally been recognized as a protector of civil liberties and civil rights in Utah.

I think it is not irrelevant that the chief proponent in Utah of this political slap—which I think was essentially revealed by the language that he, in fact, used—is Mr. Hansen, who has been posturing for political office in Utah ever since he began this program more than 2 years ago. And he is now a candidate for State attorney general.

I think the politically motivated nature of this proposal is clearly revealed by the irrelevancy of the arguments offered in its support. Although the proposal is designed to strip Judge Ritter of his title of chief judge by repealing a narrow grandfather clause, virtually none of the arguments bandied about in Utah or here at this table have anything to do with his functions as chief judge.

The main function likely to provoke dispute about the powers of the chief judge, the assignment of cases, was long ago dealt with, as committee counsel has emphasized, by an assignment rule which left virtually no assignment power to the chief judge. That assignment rule also dispenses with most of the problems of judicial administration, administration of the caseload, because it leaves management of the cases, in the hands of the judge to whom the case is assigned for trial.

Therefore, the remaining authority of the chief judge or the office of chief judge is mainly ministerial. The function of handling, primarily, the bankruptcy court, the clerk's office, and the probation department.

I am not aware of any discussion in this committee hearing addressed to any of those issues. Beyond those observations and with respect to the main thrust of the arguments offered by Mr. Hansen, I think it is difficult to respond factually for precisely the reasons, Senator, that you have pointed out—that this is a matter which, if it is to be the subject of discussion and dispute, required trial.

We have questions of fact, detailed questions and charges which have been propounded and there is no opportunity for answer in this kind of a forum. By urging enactment of this bill, it seems to me that the essence of the proponents' position is that they simply hope to

punish the judge for attitudes or for constitutional and legal positions that have no significant relevance to the role of chief judge.

Even assuming the good faith of the complaints addressed to the judge with respect to these factual issues, which have been broadly asserted but not supported in detail, they simply concern his role as an independent Federal judge, a member of the Federal judiciary, and his status as chief judge is simply irrelevant.

The manner in which this proposal has been promoted, first before the assembled State Bar of Utah, and now before this committee, reveals its real purpose. The proponents have acknowledged that the primary motive was to redress what they claim to be the judge's irascibility, lack of adequate judicial decorum and similar kinds of charges.

There has never been, to my knowledge, any effort by the proponents to seek a quiet and amicable resolution of any differences they may have with the judge arising out of particular cases. So far as I know, none of the proponents have ever sought the assistance of the bar leadership, by proffering detailed examples of their complaints, and seeking the assistance of the Bar leadership to resolve any complaints.

It has rather been their approach to seek maximum publicity for their efforts at confrontation and their use of the committee is merely their latest forum. There's no question that Chief Judge Ritter has been a controversial judge. I think he would agree to be characterized as sometimes "crotchety." It is clear that he does not tolerate fools gladly in his courtroom and he sometimes assists them in recognizing their true identity.

He tends to make prosecutors turn square corners and he narrowly limits their latitude because of his personal and substantive perception of the danger to liberty of the largely uncontrolled powers vested in the prosecutor.

During my tenure in the Office of the U.S. Attorney, I certainly felt, in some instances, that the judge too narrowly limited the scope of appropriate examination and sometimes set schedules that put our preparation to the test.

But the proper way to deal with these conflicts is to recognize that our legal system is designed to accommodate and resolve the inevitable conflicts between the administrative and judicial branches.

Thus, the present U.S. Attorney, I think, quite properly has set out through the established legal process to contest the judge's restrictive view of the appropriate role of the grand jury. There is reason for the prosecutor to be concerned about the need for the investigative and charging powers of the grand jury.

But there is equally good reason for a responsible judge to be concerned about the prosecutor's easy control of the grand jury or the possible misuse of grants of immunity. These inevitable conflicts arise from a problem on which there is a reasonable basis for difference of opinion, including possible legal error by the judge, as well as by the prosecutor.

So long as efforts to resolve these inevitable conflicts remain within the legal process, strongly held viewpoints will be expressed, but the issues will be resolved on principle and without damage to our institutions.

But when politicians begin to suggest the use of political instruments to punish or chastise Federal judges, constitutionalists are obligated to speak out for the independence of the federal judiciary.

It is not necessary to resolve the uncertain question of whether this proposal is a bill of attainder. It is sufficient to recognize that the underlying policy of that constitutional prohibition is especially offended by selective legislative sanctions aimed at a single, identified Federal judge.

In this instance, the distasteful aura of legislative condemnation of an individual without trial would be seriously magnified by the dangerous legislative precedent set. If this bill is approved, it becomes fair game for senators who conceive themselves to have serious philosophic or personal differences with a Federal judge to develop imaginative legislative sanctions to strip their target of various perquisites of office.

The only difference is that in this instance no imagination was needed because Judge Ritter is the last of a legislatively defined class permitting easy targeting by a simple repealer. Nor does it seem to bother the proponents of this bill that legislative trial or Judge Ritter should take place in this forum without any notice of charges, without opportunity to know and respond to the supporting evidence and with their maximum efforts to gain public spotlight through the hearings.

Thus, the sponsor of this bill broadly reported these hearings to the people of Utah in terms which made clear that the bill is aimed personally at Judge Ritter.

The great irony of this publicity-seeking effort, however, is that in the very next column of the same newsletter, the sponsor glowingly depicted the protections for the Federal judiciary in the Judicial Tenure Act S. 1110, of which he is a co-sponsor. I would like briefly to quote the principle which the Senator lauds so highly, but apparently prefers to honor only in the breach:

> Throughout this process, there are safeguards to protect against any abuse. Any judge, who is subject to inquiries, would be accorded all rights of due process, including the right of appeal to the Supreme Court. All documents filed with and testimony taken by either the Council on Judicial Tenure or the Judicial Conference would be confidential.

It seems to me that the Senator who sponsors S. 1130 ought to have a long heart-to-heart talk with the Senator who is the co-sponsor of S. 1110.

Finally, while perhaps not raising a matter of such over-arching principle, it seems to me the committee should be concerned with the wisdom of any precedent permitting the withdrawal from prior commitment to a grandfather clause on the basis of a single senator's personal feud. That this would be the impact of the bill, it is clear. I think the legislative history has already been aptly summarized and it does show the adoption of this grandfather clause specifically for the political purposes of the compromises that were entered into at the time the bill was adopted. And it also recognized that the burden of administrative duties were not so heavy as to require the relinquishment of the chief judge role in a two-judge court.

I don't believe that any of the commitments or understandings have changed. I think it would not be a credit to the political process

to evoke this kind of chameleon image with respect to future legislative compromises.

I do have some additional comments I would like to make beyond the formal statement, but perhaps those would come out in response to questions. If not, I would like to reserve an opportunity, if I may, to address some further matters.

Senator BURDICK. I just have one or two questions. Then you can respond further, if you wish.

Mr. LOCKHART. All right.

Senator BURDICK. You stated in the opening of your testimony that most of this is irrelevant because it doesn't deal with his duties as a chief judge, such as the matter of taking care of bankruptcy matters and other matters. The magistrate should be under the jurisdiction of the chief judge; would it not?

Mr. LOCKHART. That is correct.

Senator BURDICK. Now, you heard the testimony this morning about whether or not he was willing to assign authority over petty offenses to the magistrates. Do you care to speak to that?

Mr. LOCKHART. Yes. I certainly would. That is one of the matters I had hoped to address. I agree that the role of the chief judge would affect his handling of the magistrates question. I also agree that there probably is something of a problem in Utah with respect to a need for the exercise of authority by a magistrate.

But I think this kind of example illustrates, as well as can be illustrated, the essential conflict which provokes this kind of legislative solution, if that's what it can be called. This is a dispute of principle. There is a great deal of underlying concern on the part of Judge Ritter, part of which Mr. Westphal previously expressed, with respect to the proper status and role of a magistrate.

And that underlying background, I think, was thoroughly laid out in the correspondence. He is, I think, properly concerned that if a magistrate is to exercise that kind of trial authority that he should be independent and full time.

In addition, I should say that on a number of occasions I approached Judge Ritter while I was the U.S. attorney to attempt to persuade him from my viewpoint that it would be appropriate to authorize trial—magistrates' trial of petty offenses.

His response was a philosophic response and I think reflects nothing with respect to the—excuse me.

Senator BURDICK. I'm a little bit concerned. There may be a vote on right now. There will be a recess for a few minutes.

[A short recess was taken.]

Senator BURDICK. You may continue.

Mr. LOCKHART. Senator, I believe we were discussing the magistrate question and the position that I was leading up to was simply that it seems to me quite apparent that this is an example of the kind of difference of opinion with respect to judicial judgment—the court's concern about the dangers of abuse of less than a full-time magistrate.

I believe there is another element present. I have heard Judge Ritter expound upon his concern that if the power of arrest and petty trial for minor offenses in the national parks and national forests and so forth were too readily available, there would be a tendency to petty abuse by enforcement officials who are poorly trained, who are not trained to be enforcement officials, but are rather forest

service people or national park service people who have had no experience with enforcement.

Now, that's not necessarily a ground for rejecting the magistrate role, but the point of the matter is that it is a principled concern which is appropriate to the judiciary. And if the U.S. Attorneys Office disagrees with that position, the proper approach is to resolve it in the courts by making the request that your counsel has suggested for authority from the 10th Circuit to require magistrate trial authority.

Now, those kinds of disputes of principle, it seems to me, are at the heart of most of the discussion that we have been having. And it is perhaps disappointing to the prosecution and it is disappointing to the State attorney general to have a judge on the bench who does not roll over and play dead whenever they appear ready for trial or not ready for trial perhaps.

But the essence of the matter is principled dispute on almost every issue that these people have raised. They are entitled to their day in court, but the judge is entitled to take a tough position; and those things are at the essence of the legal process.

The grand jury question has been addressed here and I had some experience with that. And the present U.S. Attorney properly recites the essence of that experience, but let me fill in some details. I did, in fact, agree to an order in—I guess it was April 1975 or at least it was shortly before the end of my tenure in that office—in which I agreed that the scope of the issues before the grand jury should be limited to certain matters. The fact of the matter is, however, that there were no other pending matters for grand jury attention at the time that that order was entered.

All of the matters then pending for grand jury attention had been directed to the grand jury. Indictments had been returned in all of the less significant cases. There were a couple of major investigations going forward under the administrative supervision of the Antitrust Division. And those, I felt, were important matters.

Now, we make a great fuss about the number of days of grand jury sitting, but in fact that grand jury was empanelled in February of 1975 and it was not dismissed until December of 1975. And the number of days of sitting had more to do with the lack of preparedness or readiness to present matters by the Antitrust Division that it did with the judge's willingness or unwillingness to hear the matters.

Now, that may be an appropriate matter for this committee's concern with respect to other kinds of inquires. I think there is reason to be concerned about the structure and limitations upon the readiness of the Antitrust Division to proceed in some of these matters.

I don't know the facts about that. They may have not—they may have had very good reason not to proceed. They had to begin with some factual inquiry, an investigation, which presumably laid the groundwork for later inquiry. But whatever the reasons, the point of the matter is that there were pending only those two investigations and that they did continue throughout most of 1975 or that the grand jury was available for proceedings.

Are there any other matters that——

Senator BURDICK. You say the grand jury was in session in 1975 from February until December?

Mr. LOCKHART. Well, I don't remember the date on——

Senator BURDICK. Or November?

Mr. LOCKHART. I'm sorry. I may have misspoken. I don't remember the date on which the grand jury was dismissed. But it was certainly clear that they were sitting, convened, and not dismissed throughout the major part of 1975.

Senator BURDICK. What other matters would come under his jurisdiction as chief judge other than bankruptcy, magistrates, grand jury? What else would it entail as——

Mr. LOCKHART. The grand jury would not come under——

Senator BURDICK. Special duties of the chief?

Mr. LOCKHART. I think we should be clear that in talking about the grand jury, we are addressing it only in the very general sense of relevance that Senator Garn has suggested because the role of the grand jury is subject to the assignment rule with respect to criminal cases.

Other administrative matters other than the handling of the clerk's office, about which no complaint has been made, the handling of bankruptcy, about which no complaint has been made, the handling of probation and parole, about which no complaint has been made. I know of no other relevant functions of the chief judge.

It seems to me that the magistrates role is the only role. Let me point out something else about this. Let's assume that all of the substance of what these comments have to offer should be demonstrated. I certainly reject out of hand most of the complaints about misconduct, but let's assume that those are established.

The effect of this bill would simply be to adopt the present assignment rule in the State of Utah with respect to assignment of cases and the present effect of that assignment rule would be to move Judge Ritter's authority to the northern district, where he would be acting as the same, independent, perhaps sometimes crotchety Federal judge in the northern district, as he now is in the central district. That would be the present effect of the assignment rule because the assignment rule is drafted in terms of assigning cases between the "chief judge" and "associate judge" on that district court.

The desire on the part of Mr. Hansen, who appeared before me, is that this matter really ought to be before the Judiciary Committee of the House with respect to an impeachment suggestion—in fact, Mr. Hansen attempted to promote such a proposal before the State Bar of Utah. He offered the same pile of irrelevant information which deals mainly with substantive questions, as you've seen, rather than with conduct, and could not obtain a single vote from any bar commissioner urging that the matter be taken up for impeachment. And, indeed, one of the top level conservative members of the bar commission at the meeting of the Utah State Bar stood up and I think in a conscientious statement from the heart said in substance, "I have been greatly concerned about this matter. I have examined all of the evidence submitted, and I find nothing on the evidence that would suggest the appropriateness of a referral to the House of Representatives."

Senator BURDICK. How many bar commissioners are there in Utah?

Mr. LOCKHART. Oh, boy, you've got me—roughly six or eight.

Senator BURDICK. Do you have any questions?

Mr. WESTPHAL. I have none, Mr. Chairman.

Senator BURDICK. If you have nothing further, thank you for your testimony.

Mr. LOCKHART. Thank you.

Senator BURDICK. Our next witness is Judge David T. Lewis, chief judge, U.S. Court of Appeals, Salt Lake City, Utah. Welcome to the committee, Judge.

Judge LEWIS. I'm am glad to be back, Mr. Chairman.

Senator BURDICK. Judge, can I make a contract with you?

Judge LEWIS. I know what the contract is, and you don't have to put it in words. You want to be free by 12:30.

Senator BURDICK. If it's all right with you, I'll stay here until 12:15, and you can finish with Mr. Westphal, if you wish. Otherwise, you can come back after the joint session. Which do you prefer. Unless you can finish in 10 minutes.

Judge LEWIS. Well, let's see what happens. I have no objection to coming back.

Senator BURDICK. Thank you.

Judge LEWIS. And I don't want to be accused of sluffing the question off in any way. It is of importance both to me as chief judge in the circuit and certainly of importance to the people of Utah and the bar.

STATEMENT OF HON. DAVID T. LEWIS, CHIEF JUDGE, U.S. COURT OF APPEALS, SALT LAKE CITY, UTAH

Judge LEWIS. I favor the bill. In reviewing the legislative history of it, it seems quite apparent that the principal purpose of the bill is to have uniformity in chief judgeships at the district level. Senator Eastland so stated and when the amendment, the grandfather clause, came up, he submitted to it and made the statement that attrition would take care of the problem and it did with the exception of Chief Judge Ritter.

And it has persisted since then. I disagree with the statement that the bill is limited only to him. The subject of the tenure of chief judges is one of great importance in being considered in many places and by many committees of the Senate. And the commission in charge of appellate revision has recognized that the chief judge of a circuit—of course, their inquiry is limited to the appellate court—shall it be for a term certain of 7 years and one term only.

That philosophy, if that recommendation is good—and I testified earlier before another committee on that, indicating that I had no objection to it, that basically it would be better to get rid of a bad chief judge at the end of 7 years than to perpetuate a good one. And the theory of the committee there was that 7 years is a good enough length of time to put in whatever administrative reforms you think needed, implement them, and see what the result is.

Now, if that's the problem—and I think it's one of the basic problems—is how long should a chief judge serve regardless of whether he is on the district or on the court of appeals. It's utterly inconsistent, in my mind, to say that it is desirable for this Nation to turn over the chief judge of the circuit every 7 years and to perpetuate this grandfather clause.

Uniformity hasn't been obtained and he has been chief judge ever since his appointment in 1949. It's just on principle. I think the

original purpose of the bill, setting the age of 70, is frustrated, in fact, by this perpetuation. And second, if it's desirable to have a turnover of 7 years, I don't see why in the world this one should be perpetuated for any particular reason.

Now, in your letter to me, Mr. Chairman, you asked me to give primarily factural comment on this subject and you specifically ask what has happened to the "effective and expeditious administration of the business of the Utah District Court since Judge Ritter attained the age of 70." Now, those words "effective and expeditious administration of business" are lifted from the statute pertaining to the powers of the Judicial Council of the circuit.

And I assume, by using those words, that you place some significance on that aspect of it and I think you properly should. So in my prepared statement, I have attempted to analyze a few of the problems that have happened there. I think it's a fair statement to say—and I leave it to others as to what the reason is—that the overall administration of justice in Utah is not and has not been for a goodly number of years all that we could hope for.

There's constant turmoil and was during the entire tenure of Judge Christensen and Judge Ritter and it hasn't stopped. The first time I participated as a member of the Judicial Council in the 10th circuit in matters pertaining to Utah was in 1958 when the basic dispute arose as to the assignment of cases.

And we had a full hearing on it. Judge Ritter and then Associate Judge Christensen appeared to testify. Judge Ritter was assigning the cases arbitrarily. There was a legitimate dispute between the two of them. We settled that administratively, pursuant to our specific power granted under 173 to so do and we had a genuine dispute. We issued that order in 1958, divided the work as best we could, and things went along pretty good until 1965, until another dispute arose between the same two judges. And these are administrative matters I'm talking about entirely.

When the new facilities, court facilities, at Ogden became suitable for use, Judge Ritter wouldn't go up there; he didn't approve of the building of them and he wouldn't hold court in Ogden. So a dispute arose as to our old rule, what we were to do about that. We had another hearing on that.

We divided the work differently and that's what happened when we kept Judge Ritter in Salt Lake and we gave the whole northern division to the associate judge because he was willing to travel.

Incidentally, Mr. Westphal, they are both resident judges in Salt Lake. A third dispute arose, this time recent, among Judge Ritter, Judge Christensen, and Judge Anderson, who is the current associate judge.

That dispute was concerned with the cases that had been assigned to Judge Christensen when he retired from active status. Judge Ritter's attitude at that time was that the original administrative order of the Council had been directed to him and to Judge Christensen personally and that when Judge Christensen took senior status the order had no further force or effect.

We didn't agree with that so we issued a third order saying that Judge Anderson had inherited Judge Christensen's calendar that had been assigned to him and to the position, not to the persons. We rejected

Judge Christensen's claim that he owned them himself regardless of the fact that he had retired or taken senior status.

And we ordered Judge Ritter, who was then assigning these cases to himself, to reassign them to Judge Anderson and let him do it, handle them. Judge Ritter openly defied that order, which brought into play the power or lack of power that the Judicial Council has.

It also reached us in the form of a writ of mandamus because Judge Ritter called one of those cases before him, in direct contravention of the order of the Council, and as you are well aware, the wording of section 332(d) says, "The district judges shall promptly carry into effect all orders of the Judicial Council."

Senator BURDICK. Judge, the witching hour has arrived.

Judge LEWIS. Oh, yes. It came quick. Whatever you say, Senator. I'll come back, if you wish, or I could stay with counsel. I don't care which.

Senator BURDICK. It's your choice. I'll be back here at 1:30 or you can continue with counsel now.

Judge LEWIS. Well, I would like to talk to you about your concept of the Judicial Council. After my fifth appearance before Senate committees—and I caught the dickens on both sides of it—I've been accused of being too aggressive and too lax on it. And I think a little oil from this subcommittee on that aspect of it, regardless of this bill, might help this problem and others.

Senator BURDICK. Well, then, you would prefer to come back at 1:30?

Judge LEWIS. I think I would, yes.

Senator BURDICK. OK. We will recess until 1:30.

[Whereupon, at 12:15 p.m., the subcommittee recessed, to reconvene at 1:30 p.m., this same day.]

AFTERNOON SESSION

Senator BURDICK. Judge Lewis, you may continue.

Judge LEWIS. Mr. Chairman, when we recessed, I believe I was mentioning the third Council order issued relative to the assignment of cases, which is within the period since Judge Ritter became 70.

As I say, he openly defied the Council order and he set the case for trial before himself—one of the cases in this group, several of them. He called one up and one of the parties asked for an application—to file an application for writ of mandamus, which, of course, was tied into a particular case. So we were acting in a judicial capacity when we considered that.

And we issued a writ of mandamus, telling him to transfer these cases back to Judge Anderson. But he held his hearing, notwithstanding the writ and the Council order. He had them come down to court, which, of course, put the bar in a terrible position. They had conflicting judicial orders and the Council order.

One side was willing to go forward and the other side appeared, but refused to participate, saying they were obviously in contempt of one court or another, which, of course, is a miserable situation to exist at all. A couple of days later Judge Ritter issued his own order, dividing the cases between himself and Judge Anderson, exactly the

way that the Council order divided them, and purporting to act under his own order, he assigned this case back to Judge Anderson.

That order is still on the books down there and Judge Anderson has never acquiesced in the fact that it isn't the order he is acting under. He is acting under the Council order and not Judge Ritter's personal order.

The result is the same. We did nothing further after our order, we thought, had been complied with. If Judge Ritter wanted to think it was his order, why, we didn't see any use in making any further fuss over it. But it's still there and that unhappy situation could be avoided, I think, any repetition of it, if this bill is passed.

There's no other chief judge that I know of who has ever defied an order of the Council in that manner. Now, those aren't the only Council orders that we've issued on this or related matters pertaining to Judge Ritter, but they predate his 70th birthday.

One was, for instance, where he refused to allow any filings in the clerk's office on matters of naturalization. He just wouldn't accept them, so they had to go to State court. And we issued a Council order telling him he had to accept them and to hear them. And then Congress passed an act to back that up. That became moot.

We presently have pending before us, as other witnesses have testified, a number of writs directed against him, some seven in all, two of which are aimed at administrative orders, one of which was an order of our Council designating the rules to apply to whom and under what conditions people had free access to the clerk's office.

And it has been accepted generally throughout the circuit as what the courts were doing anyway. Judge Ritter is accused, at least, with the pending writ, of having forceably ejected a person he considers undesirable from the building who was attempting to get some information from the clerk's office.

So administrative matters are in some turmoil there and always have been. As far as the assignment of cases or relating matters. I have no doubt in my own mind that the Council has priority to take hold and to issue the orders.

The difficulty is when a district judge defies the orders. As far as I know—and I don't know of any court in the Nation that's been more exposed to it than the 10th circuit has—we've had a judge in Oklahoma, as the Senator is well aware, that we got in a pack of trouble over—both the Council and the Nation and everything—because we tried to handle that matter by Council action. And I was intensely interrogated before another Senate committee on that, severely criticized for the order of the Oklahoma case and a little unhappy about it because I dissented on it. I agreed that we had gone too far—we didn't have the power.

Now, press reports in Utah—and, of course, I don't know where they get their information—have consistently said that one of the effects of this bill would be to take away Judge Ritter's power of assignment. I think the Council has done that and done that a long time ago. We've modified it and our present order is in effect.

And it is being complied with—subjectively Judge Ritter is complying with his own order, but actually it makes no difference as far as we're concerned, except it might surface again and we'd have a pack of trouble again.

I think the power of the Council is clear in that matter and when we pass to the matter of the magistrates, I don't think the Council has any power whatsoever to do anything about it. And I'm deeply concerned about that—the general administration of justice in Utah.

Judge Ritter—oh, about 2 years ago—summarily discharged his magistrate and I assume that at the time he did it, he didn't realize that the term was for a term certain and that you couldn't summarily remove a magistrate, the same way you can a clerk of court. They are in there unles they—they are entitled to a hearing—can be removed for cause.

There was a time when this magistrate who was doing Judge Ritter's limited functions as a magistrate was not being used at all, but was drawing a full salary for it. I personally interfered with that, not as anything more than a native Utahan who was on a higher court, saying I thought it was intolerable to have an employee drawing $15,000 a year who was doing nothing. He had no duties and wouldn't be used. And they got together and they agreed to switch magistrates. And the Ogden magistrate would travel to Salt Lake and the Salt Lake magistrate would travel to Ogden.

And then when the term expired, that position was never filled. So at the present time we have one part-time magistrate, who does nothing except conduct preliminary hearings. Now, that doesn't comply with my concept of what Congress intended by creating magistrates.

I think it's a gross failure not to activate and use them and especially in Utah, where distances are so great and we have so many military installations and national parks, where traffic control— all kinds of controls within there—there's no use making an arrest because it never reaches a court or a magistrate.

Judge Anderson has tried a few of them, such petty things as somebody carving his initial on a tree in a national park. Well, of course, that is not—that's a complete waste of judicial power, I think, when magistrates can and should do those things.

I've received personally many complaints in that regard—the Justice Department, of course, the Department of Agriculture, the Forest Service, the Wildlife Management, General Services. They can't even regulate parking in the Federal buildings there because if they issue a ticket that's the end of it. Nothing ever happens. And as soon as people find out that nothing is going to happen, why, they are going to park anywhere and it is utter confusion.

I personally have suffered that difficulty in my own case. I can't keep my own parking place clear.

I can truly say that in my considered judgment that is a failure of administrative work and utilization of the existing remedies for such a thing. Some years ago Utah had one of the worst—passing to another subject—records on the utilization of juries. That has improved and I have attached to my written report the administrative office report on such things and which contains the comment that it is largely due to Judge Anderson's revision of his use of the juries. Judge Ritter is going along the same way.

The Bankruptcy Court is administered well, always has been. Judge Ritter made an excellent appointment. The man is competent. Everything is fine in that regard.

I don't know what the chairman's attitude is about the powers of the Judicial Council, but we think that we've done everything we can, formally, informally, to dilute the turmoil that has existed in Utah for a long, long time. It surfaces on minor matters, where persuasion has been effective.

But we are the only circuit that I know of where we have had any district judge openly defy Council orders. Early—I think it was in 1958—I'm not certain of the date—we wrote in the—what's the famous Indian Horse Case?—in which we reversed Judge Ritter and suggested that the record indicated that he felt so strongly in favor of the Navahos that we suggested to him that he let some other judge hear the case.

It came—he stated in open court that he wasn't going to follow any suggestion of the circuit court, the court of appeals, and proceeded. And they, again, filed a writ asking for enforcement of what we had suggested, which we did. And I had some doubt about whether or not the court of appeals had the power to make findings from a record that a man, district judge, was disqualified—and I'm no advocate of the big brother system on the court of appeals trying to run the district courts in any way.

But we backed that writ up with a Council order, thinking perhaps that the wording in 332 might bolster the effectiveness of it. And Judge Ritter sued us with the original writ in the Supreme Court, alleging that the Council order was unlawful, that we had no power to issue any orders because any and all orders were an interference with the independence of the district court and applied for certiorari on the judicial writ, both of which were summarily dismissed by the Supreme Court without necessity of anything on our part and were dismissed at the instigation of the Solicitor General.

There are other matters that I haven't treated in detail in my written statement, but I wasn't sure how far you wanted to interrogate me on them. They do affect the administration of justice in Utah and they are administrative matters. It has been pointed out to this committee earlier today that there are no written local rules affecting the court as a whole.

Judge Christiansen, when he was an active judge, formulated some of his own. We still have them printed. Judge Ritter wouldn't approve of them and wouldn't approve the expenditure of money for that purpose. We handled that informally by asking the administrative office to expend the money to let Judge Christiansen publish his rules. They complied with our request and it was done.

They never met regularly to discuss the business of the court. I don't know whose fault that is. It takes two usually to create that situation in some way. But it is done everywhere else. Every other district court in the country—the judges meet to discuss their general problems. And I don't think it improper for me to state that I think the cause, the uniqueness of the two-judge court, where the vote of the chief judge is a majority, if they disagree on such things, has been the basis of it. What's the use consulting? What's the use doing anything because he's going to do what he wants to anyway and he has a statutory right to do it?

Judge Christensen has been very unhappy because when he retired he was never asked to participate in district court cases. Since he took

senior status, I have assigned him regularly to the District of Utah, but he has never been utilized because I don't have the power to give him a particular case. I can assign him to make him available, but it's up to the judges to use him.

These matters are important. I see no way the Judicial Council can solve them. I repeat that I think the Council has done everything they can. We've handled things informally. We've done it by persuasion. We've done it by formal order. And every time an important order comes down, it is defied and we are uncertain as to whether we can do anything about it. If they issue one order, there's not much use issuing another one.

It's my view that we don't have the power to do it. We're acting in an administrative capacity without any sanctions that we can invoke. A pending writ we have asks to hold Judge Ritter in contempt for violation of a Council order. I don't think we have that power.

If I attempt to recommend to the Council that we do it, what would happen, perhaps, is what happened earlier with Chandler, and the first thing we know, I'll be before the Separation of Powers Committee trying to justify why we have interfered with the free independence of a district judge.

Those powers should be spelled out, Mr. Chairman, in some way. As I indicated in my preliminary statement, I've lived in Utah all of my life and have lived with this problem all of my judicial career. It has been an unpleasant thing for me and frustrating.

I've been criticized both ways for being too aggressive and not aggressive enough. I'm open to suggestions and I'm open to any questions that you want to ask me about anything I've mentioned. There's another power, of course, which is inherent in the chief judge and which would dispell the cure, and that's the fact that he has the sole power, naked power, to appoint any officer of the court, whose disagreement with the chief judge is in—he summarily has discharged a clerk recently, chief clerk of the court. It has been vacant for about 60 days or so, as far as I know. It hasn't been filled since I left Salt Lake. That condition occurred once before and there was no clerk appointed for a long time.

I will just repeat the conclusion that while this bill won't cure many of the things some of the earlier witnesses have talked about, it will cure some things and I think it would cure the magistrate problem immensely and quickly. I'll be glad to answer any questions that you might think proper.

Senator BURDICK. Thank you very much, Judge.

It wasn't clear what happened in the magistrate situation. Has he refused to ask for more magistrate help?

Judge LEWIS. Refused to do what? I didn't hear your question.

Senator BURDICK. Has Judge Ritter refused to ask for more magistrate help?

Judge LEWIS. He let that term expire without reappointing anybody. The magistrate is controlled—initiated and controlled, the number and the salary—by the initial analysis the administrative office made, which was for four. Of course, Utah has grown quite a bit since then and if you don't use them, you don't get them.

Each district is analyzed as to what the magistrate is doing, what duties he has, what time he spends on it. And if you don't appoint

anybody to these offices, they are taken away from you, and rightfully so. There's no use having—and that's how that operates.

The administrative office makes a survey. It is referred to a committee of the Judicial Conference and the Judicial Conference makes a recommendation, based entirely on the utilization. There have never been more than two part time and now there is only one, very competent man, but he is doing nothing but preliminary hearings, absolutely nothing.

Senator BURDICK. Well, I know how the selection is made, but is there any input from Judge Ritter? Has he ever asked for consideration of more magistrates?

Judge LEWIS. No. He didn't even fill the ones he had allotted to him. There are a lot of communications in my written report in which he says he is going to assign all of these duties to them and that they need them and they are going to use them to the fullest, but they never implemented it—never did.

Senator BURDICK. One of the problems the committee will have to wrestle with, as I see it, is: Suppose the facts you've given me this morning, and have been given by the other witnesses, suppose they had occurred when Judge Ritter was at the age of 67 rather than 77. What would be the procedure?

Judge LEWIS. On what problem?

Senator BURDICK. Well, removing him from the chief judge status.

Judge LEWIS. I'm not sure I understand your question. If he was 67?

Senator BURDICK. Yes. Suppose he hadn't hit that magic 70, how would you proceed?

Judge LEWIS. You wouldn't.

Senator BURDICK. Well, then, there's no remedy in that situation; is there?

Judge LEWIS. If he were 67?

Senator BURDICK. Yes.

Judge LEWIS. No. You've just got a judge that isn't performing well. It won't happen, Mr. Chairman, on a multiple-judge court. If you have a chief judge that can be outvoted—he is outvoted. It lies with the judges. It isn't an inherent power of Judge Ritter to do this. He has the power only because it's a two-judge court.

Senator BURDICK. Well, as I understand, the grandfather clause only applies to a two-judge court; isn't that correct?

Judge LEWIS. No.

Mr. WESTPHAL. That's right.

Judge LEWIS. Well, yes. But it applied to two-judge courts at that time. Utah is the last survivor. It still has two. There were other two-judge courts at the time and some of those still survive with the same chief judge. They now have four judges and none of them have reached the age of 70—but there's only one. He's in the South—I think the southern district of South Dakota. He must have been very young when he was first appointed.

Senator BURDICK. In other words, this procedure we're using here—or sought to be used, I'll put it that way—is not a direct approach to the problem?

Judge LEWIS. Well, I'm not sure. I wouldn't say unequivocally "no." I get back to the basic concept that the Senate is exploring and everybody is exploring as to the tenure of the chief judge, that you don't want to perpetuate a chief judge at any age if he's out of whack with the modern procedures and modern innovation.

This bill, for instance—not "bill," but the recommendation of the Commission on Revision of Appellate Courts—I would probably be the biggest target for that. It would take me right out 6 years before I turn 70. I have no objection to it—I so testified. I think there's a lot of merit to—chief judgeships should turn over, Senator.

Senator BURDICK. I know, but 31 judges have had the benefit of this law. Now we come to the 32d and we say "no." That's what I'm saying. When Judge Ritter steps out, this law automatically expires, this grandfather law.

Judge LEWIS. Well, there will be some changes made if he loses his chief judgeship. Of course, he remains on the bench and 99 out of 100 complaints that you hear about Judge Ritter are not administrative in nature. It's a different problem. I'm not here to testify on that problem.

But if you're on a multiple-judge court and your word is it, there's an element of power that makes you tend to ignore the judge that you're not very fond of. They are not consulted. Judge Anderson and Judge Christensen were never consulted on a major, important appointment down there, except perfunctorily, ever.

Senator BURDICK. Do you have any questions?

Mr. WESTPHAL. In the areas in which the chief judge, by virtue of being the chief judge, has authority by reason of the statutes, you've mentioned the referee in bankruptcy situation where he has the power to appoint the referee in bankruptcy, you say that that referee's bankruptcy office is functioning properly, as far as you are aware?

Judge LEWIS. As far as I know.

Mr. WESTPHAL. You mentioned the operation of the clerk of court office. The chief judge has the complete power to appoint and to relieve of office the clerk of the court and his deputies; is that right?

Judge LEWIS. He doesn't have that as far as—the statute doesn't give it to him. It says that in a two-judge court that if they can't agree, then the chief judge will do it. If they don't agree——

Mr. WESTPHAL. So that by virtue of not agreeing or not consulting, under that kind of a statute, the chief judge can just arrogate to himself that power of appointment.

Judge LEWIS. That's right. If he chooses to do it unilaterally, the meeting would be useless to hold. If he's not going to consult and be guided by the other judges' wishes, it's an absolute power. It's an embarrassment to the associate judge in some ways because he has no power to even discharge his own employees that are assigned to him, nor can he direct who is to be assigned to him. He has no voice in it.

Mr. WESTPHAL. You say that about 60 days ago the clerk of court was summarily discharged from his office and that the office has been vacant for 60 days.

Judge LEWIS. Well, when I say "summarily," I didn't know anything about it until I read it in the paper. I talked to the clerk afterwards. He thought that maybe he was taken somewhat by surprise. The associate judge didn't know about it.

Mr. WESTPHAL. But I take it at the present time one of the deputy clerks of court is functioning as an acting clerk?

Judge LEWIS. I don't know.

Mr. WESTPHAL. Are there a number of reports that are made by the clerk of court routinely on behalf of the court that don't have to be approved by the chief judge or by any other judge of the court?

Judge LEWIS. You mean reports to the administrative office?

Mr. WESTPHAL. The administrative office and others.

Judge LEWIS. I think that varies. It would depend a little bit on the confidence you have in your clerk.

Mr. WESTPHAL. The probation office of the District of Utah, how has that functioned?

Judge LEWIS. I'm not knowledgeable on that at all. I've heard no complaints.

Mr. WESTPHAL. On this matter of the use of magistrates—I'm looking at the statute, section 631, relating to the appointment and tenure of magistrates. And it provides that the judges of each district court shall appoint U.S. magistrates in such numbers as the conference may determine under this chapter. Where there is more than one judge of a district court, the appointment shall be by the concurrence of a majority of all of the judges of such district court and where there is no such concurrence, then by the chief judge.

Well, this again is one of the statutes where, by reason of the disagreement between two judges on a court, the chief judge would then have the sole power of appointment.

Judge LEWIS. That's right.

Mr. WESTPHAL. So that if one assumes a disagreement between Judge Ritter and whoever has been the second judge on this matter of magistrates, then that appointing power would have resided, by virtue of this statute, in Judge Ritter; is that correct?

Judge LEWIS. Entirely so.

Mr. WESTPHAL. And there have been—well, as I understand the document submitted wtih your statement—the part-time magistrate positions at Cedar City and at Provo were never filed and their positions just lapsed and eventually the authority was taken away by the judicial conference?

Judge LEWIS. Yes. That's routine.

Mr. WESTPHAL. Those two locations—are they essentially locations at or near a national park?

Judge LEWIS. Well, Cedar City would be.

Mr. WESTPHAL. And the other one is at Provo?

Judge LEWIS. Well, Provo is quite a community itself. It would be a——

Mr. WESTPHAL. But that was about a $2 or a $500 position, as I recall.

Judge LEWIS. Well, I really don't know how they picked Provo. I know that it's the third largest city in Utah. Ogden is right in the heart of the military installations and Cedar City is in the heart of the southern Utah park area.

Mr. WESTPHAL. What was authorized for Utah, as far as magistrates were concerned, were part-time magistrates, one at Salt Lake City and one at Ogden; right?

Judge LEWIS. Yes. That was the authorization until recently.

Mr. WESTPHAL. Now, you say one of the positions was vacant for awhile? Was that the position at Ogden or the one at Salt Lake City?

Judge LEWIS. It wasn't vacant. Are you referring to when Judge Ritter discharged his magistrate? He became——

Mr. WESTPHAL. Well, I thought there were two instances: One when he discharged a magistrate and the other when the term or authority expired and——

Judge LEWIS. He didn't reappoint anybody, so it lapsed and as soon as it lapses that way and is not filled, the judicial conference takes it away.

Mr. WESTPHAL. Are we talking about the same position, then, the position where he fired the magistrate even though the magistrate was appointed for a 6-year term? He fired him and then did not reappoint another magistrate——

Judge LEWIS. He did not reappoint anybody, no.

Mr. WESTPHAL.—and so, therefore, the position lapsed?

Judge LEWIS. Yes.

Mr. WESTPHAL. But yet under this statute, the language of which I read to you, he had the sole power of appointment assuming a disagreemnt between he and Judge Anderson.

Judge LEWIS. Yes.

Mr. WESTPHAL. There was some testimony here this morning by Mr. Child, the U.S. attorney for the District of Utah, to the effect that he was having some problem with receiving unduly short notice of the setting of a calendar of criminal cases for trial before Judge Ritter and that on one occasion he made a written motion to Judge Ritter requesting that the U.S. attorneys office receive 21 days advance notification of the setting of such a calendar of cases for trial.

I asked Mr. Child whether he had ever applied to the Judicial Council of the circuit under section 332, asking the Judicial Council of the circuit to, by order, specify an orderly procedure for the setting of criminal cases for trial. He said he had not.

My question to you, Judge Lewis, is, based on your experience, both from the Chandler situation and the Ritter situation, what power do you believe that the Judicial Council of the circuit has to remedy a situation involving the setting of criminal cases for trial of the type that's been described to us here today?

Mr. LEWIS. Well, let me distinguish between different aspects of it. That would have to come under 332, as a general power of the Judicial Council to effectuate the efficiency of a court. It would be very undesirable, speaking generally in my opinion, for the Circuit Council to try to impose local rules on judges. I think their judgment is much better than ours as to how to handle their own court.

I assume that we might, from the standpoint of naked power, provide court rules for Judge Ritter, but I think it would be a gross mistake to try to start to exercise that kind of power, assuming you have it, because each court operates and knows their own problems. And if you had a set rule to give 21 days notice, it might be a serious interference with the power of that judge to operate his calendar in the way he wants to operate it.

You can't cure bad judgment by a council order. You can issue it, but it doesn't solve it. It might create more problems than it cures and then the next district attorney will come along and he doesn't want that much notice.

The second thing, we don't initiate orders from the Council. Somebody has to complain to us. We don't think it's our function to watchdog or, because we become annoyed with a certain judge, to try to go in and issue Council orders right and left as to what they do.

But the biggest set back is that if we did that and he defies them, what do we do about it?

Mr. WESTPHAL. Well, I would agree that certainly you wouldn't want to run a judicial system whereby the Judicial Council of the Circuit would have to step in and correct every—or try to specify the procedure to be followed by a trial court within its circuit.

However, in light of a specific complaint, about a specific practice—and that is, a practice of setting a calendar of criminal cases for trial on what is alleged to be insufficient notice—do you feel that the Judicial Council, No. 1, would have the power to issue an order limited only to correcting this particular complaint, that is, the failure to give sufficient advance notice of the setting of the case for trial?

Judge LEWIS. Oh, I think probably we could issue such an order. I would consider it highly undesirable to do so, unless there was some really terrible failure to——

Mr. WESTPHAL. Then——

Pudge LEWIS. If we could do it with the district attorney, we could do it on civil cases, too, that the lawyer has to have so many days notice. I don't think that really is contemplated as a function of the Council. Those are set by the rules of procedure or by local rules of some kind. They vary greatly throughout the Nation as to how they operate. I'm fearful of an over zealous Council that thinks they know the best thing for every locality—their district judges. We became very aggressive at one time. As I say, I dissented on it because I thought we were overreaching. And ultimately I think we were taught a pretty good lesson: That it isn't the purpose of that statute to try to control and bind the district judge.

Mr. WESTPHAL. In any event, you do not feel that the Council should act on its own motion there, but it would be more preferable if they acted on petition of someone——

Judge LEWIS. We have to have somebody officially complain. I can't contemplate ever recommending that we interfere just on our own.

Mr. WESTPHAL. Mr. Child has testified——

Judge LEWIS. One of the most important things in the operation of a circuit, Mr. Westphal, is to keep a good relationship between the court of appeals judges and the district judges. It'll operate so much better administratively and on every level if you keep that relationship. Where it falls open for suggestions or advice and things like that, when you start to wave this section 332 around and I think it would be much worse than——

Mr. WESTPHAL. I understand and appreciate that, Judge Lewis. My only line of inquiry because we've been asked to consider here this morning some specific conduct by a specific judge and where the record indicates that upon specific occasion, when request has been made, the Judicial Council of the tenth Circuit has exercised some authority—I'm just trying to see what are, No. 1, the legal limits, and what are the practical limits of an exercise of power under 332.

And I think you've explained some of those limitations for me.

Judge LEWIS. If such a petition were filed, we certainly would consider it. There isn't any question about that. We'd hold a hearing on

it, which we've done every time there has been a serious dispute, an interjudge dispute, or between the Government and any judge.

I can't answer what the Council would do. I have personal opinion, but I'd be very hesitant to start making local rules of that nature. If it was grave enough, my attitude would be different.

Senator BURDICK. Was there more than one occasion where he refused to honor your order more than once?

Judge LEWIS. Oh, no. He has never reconciled, never admitted that we ever had any power. He has denied it. He has defined that one openly. Just eyeball-to-eyeball he told me he wasn't going to obey my order and he didn't.

Senator BURDICK. But he complied in a left-handed way by issuing an order of his own that was similar or identical?

Judge LEWIS. Identical. And, of course, the remedy would be for him to, in that particular case, would not be to defy us because it was also backed up with a judicial writ—would be to go to the Supreme Court and get relief, not to defy it under any circumstances.

Senator BURDICK. Well, my question, Judge, still is: Was there any other formal order that he defied?

Judge LEWIS. We have a present pending complaint that he has.

Senator BURDICK. But that's pending in your court?

Judge LEWIS. Yes, yes.

Senator BURDICK. Thank you very much, Judge Lewis. Your statement will be included in full in the record.

At this time without objection we introduce a letter and statement from Judge Ritter and also a stutement and exhibits from a John J. Flynn, a resident of Utah.

[The above referred to statements and exhibits follow:]

WRITTEN STATEMENT OF HON. DAVID T. LEWIS, CHIEF JUDGE, U.S. COURT OF APPEALS, TENTH CIRCUIT, BEFORE THE SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

I am pleased to comply with the letter request dated April 27, 1976, to furnish a prepared statement of my views concerning the merits of S. 1130, a Bill presently pending before the Subcommittee on Improvements in Judicial Machinery. I have also completed arrangements to appear in person before the Subcommittee on May 18, 1976, to answer such questions as the Subcommittee and counsel consider appropriate to the subject matter.

I was appointed a judge of the Court of Appeals for the Tenth Circuit in 1956 and thus have been a member of the Judical Council of the Tenth Circuit since that date. I became the Chief Judge of the Tenth Circuit in 1970 and have been a member of the Judicial Conference of the United States since that date. My residence has continuously been in Salt Lake City, Utah, from birth to the present and obviously I have been exposed, both judicially and personally, to the subject of the administration of justice within the District of Utah.

S. 1130, introduced by Senator A. J. (Jake) Garn of Utah in this session of the 94th Congress, is similiar to, or identical with, earlier bills introduced in the Congress. The Bill contains but a simple amendment to section 3 of the Act of Congress of August 6, 1958 (72 Stat. 497), the effect of which would be to repeal a provision in the cited Act that exempts then existent two-judge districts from the mandate of the Act requiring chief judges to surrender the position of chief judge at age seventy. Excerpts from the legislative history of the Act are attached to this statement (Attachment A) indicating the predicate of the amendment to the original Bill which added the so-called "grandfather clause" to which the Subcommittee's present inquiry is directed. Of particular interest is that Senator Eastland's forecast that uniformity under the amended Act would be attained through "attrition" has, in main, been accomplished by passage of time. At present Chief Judge Willis W. Ritter of the District of Utah is the sole beneficiary of the "grandfather" provision in a district having but two judges

in 1958 and still having but two judges in 1976. Chief Judge Ritter was born January 24, 1899.

Earlier efforts to enact bills identical to S. 1130 have failed despite the favorable (and unanimous) recommendations of the Judicial Conference of the United States and its members. During my tenure as a member of that Conference I have consistently voted to recommend the several bills for favorable consideration by the Congress. My support for these earlier versions of S. 1130 has in no way been dependent on any personal opinion as to whether Judge Ritter is a good, bad, or indifferent judge. I simply believe that the uniformity concerning the tenure of chief judgeships, as indicated to be the prime mandate of the Act of 1958 by Senator Eastland, should be the law and that any justification for a delaying "grandfather clause" has long since disappeared. I therefore urge that favorable consideration be given by this Subcommittee to S. 1130.

Your letter of April 27, 1976, specifically asks me to give "primarily factual" comment on whether "Judge Ritter's continued exemption from the age 70 rule has affected the 'effective and expeditious administration of the business' of his court or has adversely affected the proper administration of justice in Utah." I, of course, have no personal knowledge of the day by day administrative activitives of any district court within the Tenth Circuit nor can I sever my judgment as to the administration of justice within the District of Utah as before and after a date certain such as the 70th birthday of Chief Judge Ritter. However, I deem it proper to call to the attention of the Subcommittee several matters affecting some problems which began years ago and have continued to the present.

ASSIGNMENT OF CASES[1]

As early as 1958 a basic dispute arose between Chief Judge Ritter and the Honorable A. Sherman Christensen, then an active judge in the District of Utah.[2] The power of assignment was then being administered solely by the Chief Judge. This dispute was submitted to the Council and settled by its order dated January 28, 1958 (Attachment B). In 1965, a further dispute arose between those two judges apparently involving the utilization of new court facilities at Ogden, Utah, in the Northern Division of the District of Utah. This dispute was settled by the Council order of May 24, 1965 (Attachment C). In 1971, after Judge Christensen assumed senior status as a district judge and the Honorable Aldon J. Anderson qualified as Judge Christensen's successor, a dispute arose among all three judges concerning the assignment of particular cases the details of which are set out in the Council order of December 20, 1971 (Attachment D). This order did not settle the dispute and was openly defied by Chief Judge Ritter who set the disputed cases before him. This action was in direct contravention of the provisions of 28 U.S.C. § 332(d).[3] However, at a later date, Chief Judge Ritter, purportedly acting in his own right, entered an order of assignment identical to that of the Council and the intensity of the controversy disappeared.

Press reports have repeatedly stated that one of the effects of the passage of S. 1130 would be to take from Chief Judge Ritter his power of assignment. This I believe has already been lawfully done by Council action. However, passage of S. 1130 might well serve to negate any chance of a repetitive dispute in this area.

USE OF MAGISTRATES

I have attached hereto two surveys of the Administrative Office pertaining to United States Magistrates and their use within the District of Utah (Attachments E, F). An examination of these reports will reveal, among other things, that for part-time magistrates were originally contemplated for Utah with broadscoped duties to be assigned to them. The reports indicate a continuing deterioration in this field of administration through nonappointment to the positions and nonuse of the full purpose of magistrates. At the present time the District of Utah has but one magistrate (part-time) whose sole function is to conduct preliminary hearings.

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[1] Copies of the controlling orders of the Circuit Council are attached hereto (Attachments B, C, D).

[2] Now a senior district judge and an active member of the Emergency Court of Appeals.

[3] Section 332(d) states in its last sentence: "The district judges shall promptly carry into effect all orders of the judicial council." However, I know of no statutory authority, or case law, that allows the Council to effectively enforce its orders against a defiant district judge. Sanctions such as contempt proceedings art traditional judicial functions and the general function of the Council is administrative in nature. However, in the matter of case assignments by Council order, the dispute will reach the court in its judicial capacity in a particular case. This occurred in this instance.

In a two-judge district the chief judge, in effect, has the practical responsibility for the appointment and utilization of magistrates because 28 U.S.C. § 631 provides in pertinent part that such appointment "shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge."

As a direct result of such a severely limited use of magistrates the proper administration of justice within Utah must and does suffer. The increased burden upon the active judges is apparent. Seldom is a petty offense prosecuted through trial. Complaints in this regard have reached me from the Justice Department, Department of Agriculture, and its Forest Service and Wildlife Management, General Services Administration, Department of the Interior, and various military institutions and installations in Utah.

JURY UTILIZATION

I have delegated to the Circuit Executive the analysis of this subject. His report is attached (Attachment G).

BANKRUPTCY

All reports in this regard indicate effective administration.

COMMENTS AND CONCLUSION

I consider the foregoing to be the probable major fields of interest which the Subcommittee may care to consider. However, other factual matters may be of concern in its inquiry. Such matters include the fact that the judges of the District of Utah do not meet routinely or regularly to discuss the business of the court, no written local rules are existent in the Central Division, the services of Judge Christensen have never been utilized within the District since he took senior status, and other matters of similar nature which are quite traditional elsewhere. If these matters do concern the Subcommittee, I shall attempt to be as helpful as possible during my appearance at the hearing.

Two of the members of this Subcommittee are also members of the Commission on Revision of the Federal Court Appellate System. That Commission recommended that the chief judge of a circuit serve only for a term certain of seven years with a further limitation of one term. That recommendation combined with the original uniformity sought to be achieved by the Act of 1958 clearly indicates, to me, that S. 1130 should receive favorable consideration and ultimately should be enacted into law.

EXCERPTS FROM THE LEGISLATIVE HISTORY OF THE ACT OF 1958 (72 STAT. 457)

The initial legislative proposal regarding the relinquishment of a chief judgeship at the age of 70 years, H.R. 985, 85th Cong., 1st Sess., which was supported by the Judicial Conference, the American Bar Association, the Attorney General, the Attorney General's Conference on Court Congestion and Delay in Litigation, and the House and Senate Judiciary Committees, did not contain any provision exempting chief judges of two-judge districts from the scope of the bill. The grandfather clause first appeared after both the House and the Senate had approved the bill, the latter occurring July 8, 1958.

On July 28, 1958, Senator Frank Church, after earlier moving for a reconsideration of the bill, proposed the addition of the following amendment, *inter alia*, to H.R. 985: "except that the amendment made by section 136 shall not be effective with respect to any district having two judges in regular active service so long as the district judge holding the position of chief judge of any such district on such date of enactment continues to hold such position." 104 Cong. Rec. 15250 (1958). In support of this amendment, Senator Eastland made the following statement: "Mr. President, this second amendment [the grandfather clause] recognizes that in a district having only two judges, the administrative duties are not such a heavy burden upon the chief judge and do not require him to spend a substantial part of his time in pursuing duties other than judicial. For this reason, it is deemed desirable not to change the present relationship of the judges in districts where there are only two judges in active service.

"It would appear that in courts having only two judges in active service a relationship has existed which should not be abruptly changed. Attrition will take care of these situations, and upon the death, resignation o[r] retirement of the chief judges now serving in such two-judge districts, the effect of the law will be uniform and the provision of H.R. 985 will be enforced.

"These amendments meet the approval of the Administrative Office of the United States Courts and meet any known objection to the bill." 104 Cong. Rec. 15250 (1958). In accordance with Senator Church's amendments, the title of the act was amended to read: "An act to provide that chief judges of circuit courts and chief judges of district courts having three or more judges shall cease to serve as such upon reaching the age of 70." 104 Cong. Rec. 15261 (1958).

IN THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

January Session—1958

IN THE MATTER OF THE DIVISION OF BUSINESS AND ASSIGNMENT OF CASES IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

ORDER

A formal request, together with data in support thereof, to divide the business and assignment of cases in the United States Court for the District of Utah was submitted to the Judicial Council. The Council considered the matter at a meeting held in Denver, Colorado, on December 2, 1957, and considered it further at a meeting held in Denver on January 8, 1958. All members of the Council were present and participated in both meetings. At the meeting held on January 8, the Chief Judge and the Associate Judge of the Court for the District of Utah were present in person; each submitted an extended verbal statement; and the Chief Judge submitted a statement in writing.

The Council Finds:

(1) The Judges of the United States District Court for the District of Utah are unable to agree upon the adoption of rules or orders for the division of the business of, and the assignment of cases pending in, that Court; and

(2) The effective and expeditious administration of the business of the United States District Court for the District of Utah requires the Council to make this order under the power and authority granted to it by 18 U.S.C. §§ 137 and 332.

Accordingly, it is Ordered:

(1) For the purpose of the division of business and the assignment of cases made herein the Judge of the United States District Court for the District of Utah who is senior in commission is designated as "Chief Judge" and the other Judge is designated as "Associate Judge."

(2) All cases which are filed before the effective date of this order shall be assigned in accordance with the practice now existing in the Court. All business arising, and all cases filed, on and after the effective date of this order shall be divided and assigned as herein provided.

(3) All criminal proceedings, including cases instituted under the Federal Juvenile Delinquency Act, removal cases, and complaints for the apprehension of material witnesses, are assigned to and shall be handled by the Chief Judge in each even numbered calendar year and are assigned to and shall be handled by the Associate Judge in each odd numbered calendar year. The Judge to whom the criminal proceedings are assigned in any calendar year shall have full control over and responsibility for the call and discharge of grand juries, the return of indictments, arraignments, cases under the Federal Juvenile Delinquency Act, complaints for the apprehension of material witnesses, and all other criminal proceedings. All cases arising either by indictment returned or information filed during the period in which a particular Judge is assigned to handle criminal proceedings shall remain assigned to that Judge even though they are not concluded within such period. Proceedings under 28 U.S.C. § 2255 are assigned to and shall be handled by the Judge who imposed the sentence involved therein.

(4) All proceedings under the bankruptcy laws of the United States, under the immigration laws of the United States, and under the naturalization laws of the United States, except criminal proceedings arising under such bankruptcy, immigration, or naturalization laws, are assigned to and shall be handled by the Chief Judge in each odd numbered calendar year and are assigned to and shall be handled by the Associate Judge in each even numbered calendar year. All proceedings instituted under either the bankruptcy laws, the immigration laws, or naturalization laws during the period in which a particular Judge is assigned to handle such proceedings shall remain assigned to that Judge even though they are not concluded within such period.

(5)(a) The term "civil cases" when used herein shall include all cases and proceedings other than criminal, bankruptcy, immigration, naturalization, and

28 U.S.C. § 2255 cases and proceedings. Every civil case when filed shall be given an identifying number and shall forthwith be assigned to one of the Judges of the Court as herein provided.

(b) For the assignment of civil cases the Clerk shall prepare a set of not less than fifty nor more than one hundred cards. On one-half of such cards the designation "Chief Judge" shall appear and on the other one-half thereof te designation "Associate Judge" shall appear. The Clerk shall also prepare a set of envelopes equal in number to that of the cards. The envelopes shall be made of material which is not transparent and shall be numbered in sequence beginning with the number of the first civil case filed on or after the effective date of this order. The cards shall then be so mixed that the cards "bearing the designation "Chief Judge" and the cards bearing the designation "Associate Judge" shall be in irregular and unknown sequence. One card shall be inserted in each envelope in such manner that no one shall know the designation appearing on such card. The evelopes shall then be sealed, placed in numerical sequence and kept by the Clerk in a safe place. As each civil case is filed the Clerk shall take the envelope bearing the docket number of that case and remove the card therefrom. The case then becomes assigned to the Judge whose designation appears on such card. Both the envelope and the card shall be affixed to the file cover of the case. As required, the Clerk shall prepare and use new sets of cards and envelopes. The sequence of numbers on each new set of envelopes shall begin with the number which follows in sequence the last number of the previous set. The Clerk shall administer this method of assignment so as to prevent any predetermination of the Judge to whom a case shall be assigned and so as to bring about an equal division of the civil cases between the two Judges.

(c) No order shall be entered in any civil case until it is filed and assigned except:

(i) An application to proceed in forma pauperis in any civil case shall be heard and determined by the Chief Judge if he is available and otherwise by the Associate Judge.

(ii) If any civil case is filed with a Judge as permitted by Rule 5(e) of the Federal Rules of Civil Procedure and such case requires immediate action, the Judge with whom the case is filed may take such action as he deems appropriate and then shall forthwith transmit the papers in the case to the Clerk for docketing and assignment as herein provided.

(d) When civil cases involving a common question of law or fact are assigned to different Judges and a consolidation is proper under Rule 42 of the Federal Rules of Civil Procedure, either Judge may order a consolidation. Such consolidated action then becomes assigned to the Judge to whom was assigned the consolidated case bearing the lowest docket number.

(6) If a Judge is disqualified to act, or recuses himself, in any case or proceeding assigned to him, the case or proceeding shall then be assigned to the other Judge.

(7) If immediate action is necessary in any case or proceeding assigned to a particular Judge and that Judge is unavailable for any reason, the other Judge shall hear and dispose of the matter requiring immediate attention but such action shall not constitute a re-assignment of the case or proceeding.

(8) The division of business and assignment of cases made herein may be altered or modified by written order signed by both Judges and filed with the Clerk.

(9) The effective date of this order is February 20, 1958.

(10) An original copy of this order shall be retained in the records of the Council; a duplicate original shall be forthwith transmitted to the Clerk of the United States Court for the District of Utah to be imbedded in the records of the court; a copy shall be forthwith transmitted to the Chief Judge of the Court for the District of Utah; and a copy shall be forthwith transmitted to the Associate Judge of such Court.

Done by the Judicial Council of the Tenth Circuit this 20th day of January, 1958.

_____,
Chief Judge.

_____,
Circuit Judge.

_____,
Circuit Judge.

JOHN C. PICKETT,
Circuit Judge.

_____,
Circuit Judge.

IN THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

March Session—1965

IN THE MATTER OF THE DIVISION OF BUSINESS AND ASSIGNMENT OF CASES IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

ORDER

A request having been made that the order of the Judicial Council dated January 20, 1958, and pertaining to the division of business and assignment of cases in the United States District Court for the District of Utah, be modified and amended, and the Council having fully considered such request at meetings held upon March 22 and 25, 1965, at Denver, Colorado, the Council now

Finds:

1. The order of the Judicial Council dated January 20, 1958, was, in accord with paragraph (8) thereof, amended by order of the District Court dated May 3, 1962, and, as amended, is in full force and effect. Further reference to such order shall include the amendment of May 3, 1962.

2. The effective and expeditious administration of the business of the United States District Court for the District of Utah requires that such order be amended and thus requires the Council to make this order under the power and authority granted to it by 28 U.S.C. §§ 137 and 332.

Accordingly, it is ordered:

That the order of the Judicial Council is amended to provide as follows:

1. During both even and odd numbered calendar years all criminal cases and proceedings in the Central Division of the District of Utah shall be assigned to the Chief Judge.

2. During both even and odd numbered calendar years all cases and proceedings of whatever kind or nature in the Northern Division of the District of Utah shall be assigned to the Associate Judge.

3. The said assignments shall be automatically made notwithstanding other provisions of the order of the Judicial Council; but except as necessarily changed by this amendment the assignments, procedures, rules and other provisions of the order of the Judicial Council shall remain in full force and effect.

4. This amendment shall become effective on January 1, 1966.

Dated this 24th day of May, 1965.

Judicial Council of the 10th Circuit.

_____,
Chief Judge.

_____,
Circuit Judge.

_____,
Circuit Judge.

_____,
Circuit Judge.

_____,
Circuit Judge.

_____,
Circuit Judge.

IN THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

November Session—1971

IN THE MATTER OF THE DIVISION OF BUSINESS AND ASSIGNMENT OF CASES IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

ORDER

This order is entered pursuant to 28 U.S.C. §§ 137 and 332 and is based on and results from the following chronology:

1. On January 20, 1958, this Council entered an order concerning the division of court business and the assignment of cases in the United States District Court for the District of Utah, which order was amended on May 3, 1962, by written order signed by both Judges of the United States District Court for the District of Utah and filed with the clerk and said order thereafter was on May 24, 1965, further amended by order of the Judicial Council;

2. On August 17, 1971, the Honorable A. Sherman Christensen retired as an active judge of the United States District Court for the District of Utah and assumed the status of a Senior Judge, and on that same date the Honorable Aldon J. Anderson was duly qualified as the successor to the Honorable A. Sherman Christensen; the retirement of the Honorable A. Sherman Christensen was effective upon the qualification of the Honorable Aldon J. Anderson and no vacancy occurred in the position of associate judge for the District of Utah;

3. The Honorable Willis W. Ritter, Chief Judge of the United States District Court for the District of Utah, by an order unilaterally entered on October 4, 1971, which was later supplemented by a further unilateral order of November 24, 1971, assigned to himself those cases previously assigned to the Honorable A. Sherman Christensen and pending in his court as of the date he assumed senior status, excepting cases which Chief Judge Willis W. Ritter assigned to Judge Aldon J. Anderson and further excepting cases which Chief Judge Ritter and Judge Anderson and Judge Christensen agreed would be heard by Judge Christensen;

4. In entering his orders of October 4, 1971, and November 24, 1971, the Honorable Willis W. Ritter, Chief Judge of the United States District Court for the District of Utah, predicated his action on the assumption that the order of the Judicial Council dated January 20, 1958, ceased to be effective upon the retirement of the Honorable A. Sherman Christensen on August 17, 1971;

5. On November 11, 1971, an original proceeding, No. 71-1686, entitled Utah-Idaho Sugar Company, a Utah Corporation v. The Honorable Willis W. Ritter, Chief Judge of the United States District Court for the District of Utah, was instituted in the Court of Appeals wherein it was alleged that the Utah-Idaho Sugar Company was a party to litigation pending in the court presided over by the Honorable A. Sherman Christensen as of the date he assumed senior status, and that such litigation by Chief Judge Ritter's order of October 4, 1971, had been assigned to the Honorable Willis W. Ritter and in connection therewith the Utah-Idaho Sugar Company sought a writ of prohibition or mandamus compelling Chief Judge Ritter, among other things, to vacate his order of October 4, 1971;

6. As a result of the institution in the Court of Appeals of the original proceeding mentioned in the preceding paragraph, the court directed its clerk to inquire of the Honorable Willis W. Ritter, the Honorable A. Sherman Christensen and the Honorable Aldon J. Anderson as to whether a dispute exists concerning the current division of cases in the United States District Court for the District of Utah; and

7. The Honorable Willis W. Ritter, the Honorable A. Sherman Christensen and the Honorable Aldon J. Anderson have now responded in writing to the court's inquiry, and by their responses have indicated to our satisfaction that a controversy does presently exist, and has existed, as to the division of business and the assignment of cases in the United States District Court for the District of Utah.

Being desirous of resolving the existing dispute as to the division of business and assignment of cases in the United States District Court for the District of Utah and thereby removing uncertainty in connection therewith, it is the ORDER AND DECREE of this Council that:

1. Its order of January 20, 1958, as amended, is not in anywise affected by the fact that the Honorable A. Sherman Christensen assumed senior status on August 17, 1971, and the Honorable Aldon J. Anderson on that same date was duly qualified as his successor, and the aforesaid order, as amended, continues in full force and effect and is hereby reaffirmed;

2. Under the terms of the aforesaid order of January 20, 1958, as amended, the Honorable Aldon J. Anderson succeeds to all pending cases which were assigned to the Honorable A. Sherman Christensen as of the date the latter took senior status;

3. The Honorable Willis W. Ritter is hereby ordered to forthwith vacate his orders of October 4, 1971, and November 24, 1971, purporting to assign himself certain cases pending in the court of A. Sherman Christensen as of the date the latter assumed senior status; copies of these orders are attached hereto; and

4. The Honorable Willis W. Ritter is further ordered to vacate each and every other order that he unilaterally entered, if any such there be, affecting any case to which the Honorable Aldon J. Anderson succeeded by virtue of his qualification

as associate judge for the District of Utah; unless, however, the Honorable Aldon J. Anderson specifically consents and agrees that any such order referred to in this paragraph shall remain in full force and effect in the interest of orderly procedure within the District of Utah.

DONE by the Judicial Council of the Tenth Circuit this 20th day of December, 1971, at Denver, Colorado.

_____,
Chief Judge.

_____,
Circuit Judge.

WILLIAM J. HOLLOWAY, Jr.,
Circuit Judge.

ROBERT H. MCWILLIAMS,
Circuit Judge.

_____,
Circuit Judge.

WILLIAM E. DOGLE,
Circuit Judge.

Judge Hill does not join in this order.

OCTOBER 8, 1969.

Hon. WILLIS W. RITTER,
Chief Judge, U.S. District Court,
Salt Lake City, Utah

DEAR JUDGE RITTER: We have not received a reply to our inquiry of July 7th requesting information on the extent to which your court may assign additional duties to magistrates under the new Federal Magistrates Act, Public Law 90-578, approved October 17, 1968. Section 636(b) of Title 28, United States Code, as amended by this Act, provides in part:

> Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrates, or . . . any part-time magistrate specially designated by the court, may be assigned . . . such additional duties as are not inconsistent with the Constitution and laws of the United States.

Under the Act the Director of the Administrative Office is required to make a survey and formulate recommendations as to numbers, locations and salaries of magistrates to be appointed. The statutory deadline for completing this survey is October 17th, 1969.

Before recommendations can be formulated, we must have some indication of the types of matters which will be assigned to magistrates by your court under the above provisions of law, together with a sound estimate of the workload. Please let us know your intentions. If you would like, we shall be glad to have someone from our office come out to Salt Lake City to confer with you.

Sincerely yours,

JOSEPH F. SPANIOL, Jr.

UNITED STATES DISTRICT COURT,
DISTRICT OF UTAH,
Salt Lake City, Utah, October 15, 1969.

JOSEPH F. SPANIOL, JR.,
Chief, Division of Procedural Studies and Statistics, Administrative Office, U.S. Courts, Supreme Court Building, Washington, D.C.

DEAR MR. SPANIOL: In response to your letter concerning the Federal Magistrates Act, I wish to advise that we intend *to make full utilization of the magistrates* within the enlarged jurisdiction of the new legislation.

We shall give the magistrates additional duties in the area of civil actions pursuant to Section 636(b):

First, assisting the Court as special master in appropriate civil actions and under the Federal Rules of Civil Procedure.

Second, assisting the District Judges in the conduct of discovery proceedings in civil actions, and in the conduct of pretrial proceedings.

Third, preliminary review of applications for post trial relief with reports and recommendations to assist the Judge in deciding whether or not there should be a hearing.

There will be opportunity in many instances for the performance of interlocutory activities.

Our magistrates will hear and preliminary determine every type of pretrial motion and serve the Judge in the extremely important and burdensome business of preparation of both the form and substance of various orders for the Court's consideration.

A qualified and experienced magistrate will acquire expertise in examining various types of applications and petitions, one example of which is the very large number of habeas corpus petitions. I would expect to give to the magistrates all such petitions and applications, for preliminary examination, classification and summarization, pointing up the important contents to facilitate the decision of the Judge. Currently the District Judge must do this for himself in very large part, for the young men law clerks recently out of law school are not sufficiently qualified.

I expect to experiment with the assignments to the magistrates of every possible function that can in some measure be delegated to them without abdicating the judicial function and consistent with the constitutional and statutory limitations.

Of course the magistrates will exercise their specific statutory functions and we will carefully survey the assignment to the magistrates of addition duties so as to be sure that they will not interfere with the proper discharge of their more regular responsibilities.

Likewise, we intend to make full utilization of the magistrates in the area of criminal jurisdiction pursuant to Section 636 (a). The congressional authorization in the area of criminal jurisdiction of the Magistrates Act is somewhat broader in that it provides:

> (a) Each United States magistrates serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—
>
> (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;
>
> (2) The power to administer oaths and affirmations, impose condition of release under section 3146 of Title 18, and take acknowledgements, affidavits and depositions; and
>
> (3) the power to conduct trials under section 3401, Title 18, United States Code, in conformity with and subject to the limitations of that section.

Mindful of some of the problems in connection with sub-section (3) above, the magistrates will be allowed under certain conditions to try and to sentence persons convicted of minor offenses. We note the definition of minor offense includes misdemeanors, the penalty for which does not exceed imprisonment for a period of one year, or a fine of not more than $1,000, or both.

Full utilization of the magistrates in this area is intended to be made. Congress manifestly intended to relieve the District Court of a considerable number of minor criminal matters.

As indicated by Judge William E. Doyle in his excellent and most helpful manuscript "Implementing The Federal Magistrates Act", at page 24 there are three prerequisites to the exercise of this jurisdiction: (1) the magistrate has received special designation to try such offenses by the appropriate district court; (2) the defendant elects to be tried before a magistrate rather than in a United States District Court, and (3) the defendant executes an intelligent waiver of whatever right to jury trial he may have before the district court.

The foregoing is an incomplete summarization of the expectations of this Court to utilize the services of the magistrates and to implement the Act to further the clear purposes of the Congress to improve the judicial machinery at the District Court level. We shall endeavor to elevate the magistrates in every way to the full judicial status intended by Congress.

I am opposed to the use of part time magistrates. There is too great a hazard in Section 632 (b) which permits part time magistrates to engage in the practice of law and to engage in any other business which is not inconsistent with the expeditious, proper and impartial discharge of their duties as judicial officers. I share the apprehension of the Committee which arises from the fact that the part time magistrate position is highly sensitive since he is both a practitioner and a judge. In the first place, it is going to be difficult to get a competent and conscientious man to take the position with the danger of running into conflicts and this is so even though the earlier provision was eliminated by Congress

which provided that the magistrates were subject to criminal statutes pertaining to conflict of interest.

I have observed that the Act imposes upon the Director the duty to take into account local conditions in each district, such as the geographical areas, population, transportation and communication facilities. Surely it is unnecessary for me to enter into a discussion of these matters which are all matters of record and of public knowledge, available to the Administrative Office in Washington.

With respect to the distribution of business for the magistrates in this district, I have already indicated the extensive participation by the magistrates in the judicial business of the court heretofore handled by the Judges, which it is my intention to bring about. An illustration of the very substantial possible participation of the magistrates is found in the 1969 business of the United States Commissioner, Paul Hansen, in the Northern Division of this Court. By July of 1969 he had collected fees in the maximum amount permissable under the statute and could not collect any for the balance of the year. This resulted from the Department of Interior drive to make petty criminals out of the people who visited the picnic areas in the various National Forests, and by the official encouragement which lead to many more petty offenses on air force and government installations in the Northern Division than we had had ever before. Both of these are the direct result of make-work projects carried on in the Northern Division.

I certainly am opposed to encouraging officials to file petty offenses in order to drum up business for the magistrate and this will be discontinued in this district. I mention the matter here merely to suggest how the amount of work for the magistrates can easily balloon into oversized proportions.

Suffice it to say for the purpose of making our request for magistrates to serve this district, that we envisage more than enough work to keep two full time magistrates very busy in the Central Division, with one part time magistrate in addition for the Northern Division.

My experience with commissioners, particularly in the Central Division where we have most of the criminal business in this district, is that we need two magistrates so that at all times a magistrate is available to the F.B.I., the Treasury agencies, the Narcotic agents, the U.S. Attorneys and other law enforcement officials who at all hours of the day and night need to bring accused persons before a judicial officer. One magistrate cannot be expected to be available on such a time basis and it is unthinkable that we should have a situation arise without a magistrate available.

Without any further elaboration, the request of the Chief Judge of this district is that we have two full time magistrates in the Central Division and one part time magistrate in the Northern Division. The basis for this request is that, in my judgment from more than twenty years experience as judge of this court, I can foresee more than enough work for those magistrates if we are fully to carry out the purposes of Congress.

Sincerely,

WILLIS W. RITTER,
Chief Judge.

OCTOBER 20, 1969.

Hon. WILLIS W. RITTER,
Chief Judge, U.S. District Court,
Salt Lake City, Utah

DEAR JUDGE RITTER: Your letter of October 15th regarding the use of magistrates in the District of Utah indicates that your court would like to delegate a broad range of duties but gives no indication of the *volume* of matters to be handled. The Magistrates Act requires that in fixing the amount of salary "consideration shall be given to the average number and the nature of matters that have arisen during the immediately preceding period of five years . . ." and Judge Doyle's Committee has directed that this requirement be adhered to.

Based on the information which I forwarded to you with my letter of July 7th, it does not appear that there will be sufficient business in Utah to justify full-time magistrate positions and that only part-time magistrate positions can be recommended. Because the Director's survey report containing recommendations for magistrate positions must be completed within the next two days, we will proceed on the basis that your court will adopt local rules under which the types of functions set forth in your letter will be delegated to magistrates under 28 U.S.C. 636, as amended, and estimate salaries based on available information. The survey report is, of course, only the first step in establishing the

magistrate system nationwide. As a practical matter the system will not be effective for another year. Meanwhile there will be ample opportunity for your court to comment on the survey report and if necessary a supplemental report can always be filed. Please let me know if you have any further questions.

Sincerely yours,

JOSEPH F. SPANIOL, JR.

UNITED STATES DISTRICT COURT,
DISTRICT OF UTAH,
Salt Lake City, Utah, October 24, 1969.

MR. JOSEPH F. SPANIOL, JR.,
Chief of the Division of Procedural Studies and Statistics, Administrative Office of the U.S. Courts, Supreme Court Building, Washington, D.C.

DEAR MR. SPANIOL: Reference is made to your letter of October 20, 1969, referring to a letter from Chief Judge Ritter indicating that this court "would like to delegate a broad range of duties" to magistrates in the District of Utah, pursuant to the Federal Magistrates Act.

I have hesitated to formally express my views to the Administrative Office or to the Committee having responsibility to make recommendations concerning numbers of magistrates and their salaries in the hope that there might still be an opportunity to have my views considered by Judge Ritter before he made his recommendations. However, in view of his letter I must now state that so far as I know the court as such is not committed to a broad range of duties for magistrates and for the reasons hereafter indicated it is not at all sure that it will be so committed. So far as I know, this court has taken no action with regard to the matter. In any event, I have not been consulted concerning the matter by the Chief Judge.

I was not consulted concerning the last appointment of a commissioner in the Central Division; I did not know of it until I read about it in the papers, nor has the appointee even called upon me during the several months of his service here. A similar non-consultative appointment of one with no qualifications whatsoever for the office was ruled by me not to be valid in CR 172-65, United States of America v. James Lynn Smith, a copy of the opinion (unpublished) being attached, for reasons indicated therein. In the Northern Division, where under the Circuit Council Order I have responsibility for all proceedings, I suggested the names of several qualified attorneys for appointment after Chief Judge Ritter expressed a view that no one qualified could be found who would accept the office. After receiving my recommendations, and without consultation, he disregarded them an I named a lawyer unknown to me who had the most limited contact with court proceedings.

Whatever the powers of appointment or removal by the Chief Judge alone may or may not be under the Migistrates Act, I do not think that he has the power to speak for the court without consultation with reference to a rule of court for enlarged powers of magistrates, which must be granted with the concurrence of a majority of the judges as I understand it.

And it must be obvious that if he continues his practice of non-consultative apointments neither I nor the public will have sufficient assurance of the willingness or ability of magistrates in this district to serve both divisions of the court to justify a general rule in advance covering their enlarged powers, or the fixing of their salaries on the assumption that there should be such a rule.

Sincerely yours,

A. SHERMAN CHRISTENSEN,
U.S. District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

Central Division

(Memorandum Decision)

UNITED STATES OF AMERICA, *Plaintiff*, *v.* JAMES LYNN SMITH, *Defendant.*

This case was calendared for "arraignment" and came before me December 6, 1965, upon the "Report of Proceedings Before United States Commissioner". Upon the basis of those proceedings the defendant had been arrested and is now held,

and upon their validity depends whether the defendant should be remanded to custody or held on bond for action by the Grand Jury, or to answer here upon a waiver, if any, of indictment.

The individual signing the report as Commissioner is unknown to me except for a momentary call at my chambers when he announced that a week or so before he had been appointed United States Commissioner by the "Court", and except for what I have read in the press within the past few days concerning the belated announcement of his appointment by the Chief Judge on November 10, 1965.

From the latter announcement it appears that while the appointee doubtlessly is a man of excellent character and intentions, he is devoid of any legal or related training or experience except for visits as a spectator in former years in courtrooms in England, of which country he is a citizen; and that he intends to retain his present bookstore position during regular hours and hold preliminary hearings as United States Commissioner before or after the hours of his regular employment.

The question of whether as a part of this court I should concur in such an appointment has not been presented and is not now before me. Certainly before I would assume to decide that question I would want to know the reasons why he was designated, to see his application and to know more of his background, to determine whether there are other persons equally or more qualified who possess some degree of legal training or experience or who could make themselves available for a preliminary hearing during usual office hours for the convenience of the public and the bar, and whether such appointment should not at least be postponed until the time qualifications are met by the applicant for United States citizenship.

The only related question I have been called upon to decide here is whether for the purpose of this case the appointment in question was validly made by "The Court" and, if not, whether a criminal complaint authorized by such an appointee furnishes a valid basis for this proceeding.

Section 631(a) of 28 United States Code provides that "Each district court shall appoint" United States Commissioners in such number as it deems advisable. Subdivision (c) of that Section establishes a Commissioner's term as four years "unless sooner removed by the district court". This court is composed of two permanent judgeships. 28 United States Code § 133.

What appointments are to be made by individual judges as to the positions of their respective secretaries, bailiffs or law clerks, the statute provides "District Judges may appoint", rather than that the "court" may appoint applicants for such positions. 28 United States Code § 751, 755.

Thus it is indicated that appointments for the court, with the exceptions noted, are to be made by the court as such, rather than by individual judges. And by 28 United States Code § 756 it is made doubly clear that no individual judge, whether the Chief Judge or an Associate Judge, has the power of appointment for the Court, unless the judges of the Court, after first considering the matter together, are unable to agree upon a proposed appointment. That Section provides as follows:

"756. Power to Appoint. Whenever a majority of the district judges of any district court cannot agree upon the appointment of any officer of such court, the Chief Judge shall make the appointment."

It thus is to be seen that only when the majority of the court cannot agree upon an appointment does the Chief Judge alone have power to make an appointment for the Court. It necessarily follows that such appointment must be presented to the judges of the court in the first instance to determine whether there can be agreement on a proposed appointment before the possible appointive power of a Chief Judge could become relevant at all. If there is agreement, unanimously or by a majority of the court, the Chief Judge, or the Clerk of Court, ordinarily reports and certifies the action of the Court. If a majority cannot agree, then the Chief Judge under the conditional power vested in him by Section 756 can himself make the appointment.

By the means indicated, in accordance with the clearly expressed intent of Congress and in keeping with the minimal requirements for judicial administration, all members of the Court will be advised of proposed appointments, each member of the Court, including the Chief Judge, if he finally has to act under his separate power, will have the benefit of the judgment of each other judge; no member of the Court will be placed in the unreasonable and often embarrassing position of having everyone else know an important new appointment

has been made "by the Court" when he himself has not known that such an appointment was even being considered.

These reasons apply equally or all the more when the Court is composed of only two, rather than several members, and the statutes requiring advance notice and opportunity for consideration can be all the more conveniently complied with in the former case.

In the present instance there was never any mention made to me by the Chief Judge or anyone else prior to the purported appointment that the person appointed was under consideration, or that a further appointment was to be made at all. As far as I was advised, another Commissioner, whose term had not expired, was unremoved and had not resigned, and the Clerk of this Court as "Commissioner Pro Tem" had been designated to assist him because of illness only a few months before. That the latter appointment too was made without notice to me, although I have responsibility for the entire criminal calendar in the Central Division for the present year, does not justify such a procedure but only indicates the necessity of insistence upon compliance with the spirit and letter of the statutes with regard to such appointments in the future.

The situation now resulting is that I am not informed whether the "pro tem" appointment has been terminated or whether the appointment of the Commissioner who has served for many years here has been terminated or under what conditions or with what understanding the purported new appointment has been made, and this notwithstanding that I have the obligation of passing upon the validity of the reports from the Commissioner in all criminal cases filed in this division. While I have felt constrained to submit to such a situation with regard to other appointments, it is apparent that my responsibilities cannot be properly discharged if that system is to be continued and extended. Especially with respect to the vital position of United States Commissioner, involving as it does sensitive areas of constitutional law, rights of the individuals charged with crime, and the protection of the public by proper law enforcement, it is essential that appointments be not of questionable validity. Thus, the question is squarely presented here whether an appointee under the conditions outlined is "a Commissioner or other officer empowered to commit persons charged with offenses against the United States" within the contemplation of Rule 3, Federal Rules of Criminal Procedure.

If as a member of this Court I have no responsibility to be consulted and to consider the advisability of such appointments and to afford my colleague the benefit of my judgment with respect to them in advance, I am entitled, I believe, to have that lack of accountability judicially determined; and if I have such accountability then I assume it must be determined that I am entitled to the opportunity to express my judgment to my colleague before the appointment is made. Far beyond any question of personal privilege is the duty to consider the position of the defendant before me, who has been arrested upon a warrant signed by the appointee in question, based upon a complaint only presumbly signed before him by a complainant. If he has not been properly appointed, that fact should be promptly recognized so that consideration properly may be given jointly to his valid appointment by the Court in the manner required by statute if there are reasons therefor or if the judges are found to be unable to agree, or so that another Commissioner appointed in the manner required by the statute can be designated. For this purpose I shall hold myself available, as I always have, to confer with the Chief Judge at any time he desires.

It is the continuing duty of the Court to inquire into its jurisdiction, federal courts being courts of limited jurisdiction. I have concluded that the proceedings before me in the above entitled case are insufficient to afford this court jurisdiction to hold the defendant to answer or to otherwise proceed with the case for the following reasons:

1. Grave doubt exists whether the individual authorizing the complaint and issuing and signing the warrant of arrest purportedly based thereon is "a Commissioner or other officer empowered to commit persons charged with offenses against the United States" within the contemplation of Rule 3, Federal Rules of Criminal Procedure, because he apparently has not been appointed a United States Commissioner "by the Court" as required or permitted by the applicable federal statutes.[1]

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[1] 28 United States Code, §§ 631(a), 756. *United States* v. *Wilentz*, 25 Federal Rules Decision 492 (D.J.N.J. 1960), aff'd. 280 F. 2d 422 (3d Cir. 1960).

2. The complaint is further fatally defective for the further reason that the purported Commissioner has not even signed it, and hence, the complaint is not made upon oath before anyone.[3]

There is further difficulty with the complaint which, while not presenting necessarily a question of jurisdiction at this point, would raise serious collateral questions. The "complaint" upon which the proceedings before me must be based if it has validity appears inadequate upon which to base the warrant of arrest because of failure of the complaint to indicate on its face probable cause to believe that the offense was committed and that the defendant committed it, negating as it does any personal knowledge upon the part of the complainant except upon the basis of undefined and unspecified heresay not itself being sufficiently indicated to show probable cause.[4]

For the reasons stated the complaint reported by the Commissioner and the proceedings before me are dismissed.

Dated this 6th day of December, 1965.

A. SHERMAN CHRISTENSEN,
U.S. District Judge.

NOVEMBER 3, 1969.

Hon. A. SHERMAN CHRISTENSEN,
U.S. District Judge,
Salt Lake City, Utah

DEAR JUDGE CHRISTENSEN: I have your letter of October 24th regarding the Director's recommendations for positions of United States magistrates in your district. The recommendations contained in the initial survey report just released contemplates that one of the magistrates to be appointed will perform the "additional duties" outlined in Judge Ritter's letter.

The assignment of additional duties must, of course, be done by local rule of court. Section 636(b) of Title 28, United States Code, provides in part as follows:

> Any district court of the United States by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned . . . such additional duties as are not inconsistent with the Constitution and laws of the United States.

Where local rules of court, pursuant to the above provision of law, are not adopted by the district courts, the Director's recommendations will most certainly have to be withdrawn. For your information I am enclosing a copy of the local rules of court promulgated in the Eastern District of Virginia when the pilot program was first established there.

If we can be of any further assistance, please let us know.

Sincerely yours,

JOSEPH F. SPANIOL, JR.

Hon. ALFRED P. MURRAH,
Chief Judge, U.S. Court of Appeals, Tenth Circuit, U.S. Courthouse, Oklahoma City, Okla.

DEAR JUDGE: This is in response to your letter of January 13, 1970, concerning the implementation of the Federal Magistrates Act in Utah, particularly in respect to salary schedules.

The judges of the court met yesterday and carefully considered the tentative recommendations of the Administrative Office. We are agreed that those recommendations, particularly as they deal with a magistrate for the Northern Division, are unrealistic and unjustified in their limitations. They do not properly present the business and necessities of that division, are based upon the assumption that the magistrate there would be invested with limited duties whereas it has been concluded that the principal magistrate in each division should have

[3] Rule 3 Federal Rules of Criminal Procedure.

[4] Fourth Amendment to the Constitution of the United States: Rule 4, Federal Rules of Criminal Procedure; *Giordeonella v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958); *United States v. Barbenell*, 231 Fed. Supp. 200 (D.C.N.J. 1964); *United States v. Greenberg*, 320 F. 2d 467 (9th Cir. 1963); Cf. *Tanner v. United States*, 296 F. 2d 218 (10th Cir. 1961), in which it was held that claimed error in designating sections of the statute upon which the prosecution was based (similar errors appearing in the warrant of arrest). (Footnote incomplete.)

similar powers, and ignore the desirability of a resident magistrate with more than limited functions in the absence of other resident court personnel there. We also believe that the magistrate at Cedar City should have a salary somewhat in excess of that recommended by the Administrative Office because of the long distance from Salt Lake City and the presence in the southern part of the state of the national parks and monuments.

Accordingly, the recommendations of this court concerning salary schedules for the implementation of the Act in its initial application here are as follows:

Magistrate for the Central Division, at Salt Lake City, Utah, with full range of duties, $11,000.

Magistrate in the Northern Division, at Ogden, Utah, with full range of duties, $8,500.

Magistrate at Provo, Utah, in the Central Division, with limited duties, $200.

Magistrate in the Central Division at Cedar City, Utah, with limited duties, $500.

In view of the precipitant increase of civil court filings and their complexity during the calendar year 1969, full time magistrates may have to be sought in the future. It is believed that the foregoing recommendations represent minimal requirements at the present time if reasonable benefits of the system are to be achieved in this district.

Conference between the judges beneficially explored a wide range of other related problems and it was concluded that a solution of some of these also will be promoted by the adoption of the schedule hereby recommended.

Yours sincerely,

_____,
Chief Judge.

_____,
Associate Judge.

SURVEY OF MAGISTRATE POSITIONS ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

DISTRICT OF UTAH

I. Positions established

The preliminary survey of the Director of the Administrative Office on the implementation of the federal magistrates system was completed in October 1969. The following positions were recommended for the District of Utah:

Location and type	*Salary*
Salt Lake City, part-time	[1] $11,000
Ogden, part-time	1,800
Cedar City, part-time	200
Provo, part-time	200

The recommendations assumed that a full range of duties would be assigned to the magistrate at Salt Lake City, while the other three magistrates would perform only a limited range of duties.

Upon the request of the district judges, the recommendations were reviewed in March 1970 with a view to the assignment of a full range of duties to the magistrate at Ogden as well as at Salt Lake City. The following positions were subsequently established:

Location and type	*Salary*
Salt Lake City, part-time	$11,000
Ogden, part-time	8,500
Cedar City, part-time	500
Provo, part-time	200

II. Cedar City and Provo

The Judicial Conference originally authorized these two positions at its March 1970 session. The positions were never filled. The Conference discontinued the position in September 1973 based on the following recommendation, from page 8 of the survey report:

Cedar City and Provo, Utah ($527 and $211)

Four part-time magistrate positions have been authorized for the District of Utah. Two of them, Ogden and Salt Lake City, are at divisional offices and have

[1] Maximum salary for part-time position at the time.

been filled by the court. No appointments have been made, however, to the Cedar City and Provo positions.

Provo is about 40 miles south of Salt Lake City, while Cedar City is located in the southwestern corner of the state, about 200 miles from Salt Lake City. There is no history of United States commissioner activity at either location. FBI resident agents are located in both communities.

At the time of the original survey, the U.S. attorney advised that—

> A Magistrate should, of course, be appointed at least in both Salt Lake City and Ogden, Utah, to handle the volume of business expected in the area surrounding those two cities. In addition, there are situations which sometimes arise in the southern part of the state incident to the administration of the affairs of the United States in the National Parks, National Monuments, and National Recreation Areas which require the services of a Magistrate. I do not believe that the volume in that area of our state justifies the establishment of a Magistrate down in that section of our state. On the other hand, when situations do arise there, it is considerably inconvenient for the same to be handled by a Magistrate 250 miles away here in Salt Lake City.

Recommendation

While there may be some potential for a petty offense caseload at Cedar City in the future, the part-time magistrate positions at this location and at Provo have not been filled since their authorization and funding more than 2½ years ago. There does not appear to be a compelling need for the positions, and accordingly, it is recommended that both positions be discontinued.

III. Salt Lake City and Ogden

Magistrates were duly appointed at these two locations. No significant changes in the positions accrued until the early months of 1974. At that time the Administrative Office was advised that the magistrate at Salt Lake City had been terminated by the Chief Judge. The Director thereupon wrote the Chief Judge requesting a statement of the cause relied upon and the concurrence of the second district judge as required by statute. No direct response was received; however, the office was informed by Judge Anderson that the matter was being considered.

On May 15th the magistrate informed this office of the following resolution of the difficulty:

> [The Chief Judge] requests that I assist Judge Aldon J. Anderson in his assignment of criminal matters. Since that time I have consulted with Judge Anderson. He requests that I perform the functions of U.S. Magistrate for the Northern Division of the U.S. District Court of Utah.
>
> Accordingly, as occasion arises, I shall travel to Ogden, Utah, for the purpose of conducting necessary functions. United States Magistrate, Daniel A. Alsup, will travel from Ogden to Salt Lake City for the purpose of performing the functions of U.S. Magistrate for the Central Division.

Later that year, in accordance with established policy, both positions were surveyed to determine whether they should be continued for additional four-year terms under the current arrangement. A copy of that survey report is attached. The survey indicated that neither magistrate had been assigned a full range of duties as had originally been anticipated. Accordingly, it was recommended that the annual salaries of the two positions be reduced as shown below:

Salt Lake City: from $12,572 to $6,000.
Ogden: from 9,394 to 3,600.

Pursuant to the statutory procedures, the views of the district court and the circuit council were requested for consideration by the Judicial Conference. The Circuit Executive informed the Administrative Office of the council's recommendation that the two positions be merged into a single full-time position. In support, thereof, his letter stated:

> It is the position of Council that there is a potentially adequate workload to fully justify the full-time position for these two locations when it is properly utilized by the Judges of the District of Utah.

The Judicial Conference Committee on the Administration of the Federal Magistrates System considered the proposal but was not convinced that the workload justified the conversion to a full-time position at that time. Rather, the Committee consolidated the two positions into a single part-time position at the maximum salary for a part-time magistrate ($15,000) in order to provide

an opportunity for the assignment of a broader range of duties. The combined workload of the magistrates for the last two and one-half fiscal years has been as follows:

	Fiscal year—		
	1974	1975	1976 (6 mo)
Petty offenses	9		
Number of trials	( )	( )	( )
Search warrants	13	31	16
Summonses	(1)	(1)	5
Arrest warrants	168	200	32
Initial appearances	176	197	26
Bail reviews	5	19	8
Preliminary exams	28	75	75
Removal hearings	6	31	29
NARA hearings		1	

[1] Summonses were included with arrest warrants for the fiscal years 1974 and 1975.

IV. Rules of Court

The Federal Magistrates Act authorizes district judges to assign a broad range of duties in civil and criminal cases to magistrates to assist in the disposition of those cases. The Act requires, however, that each district court assess its particular needs and set forth in general rules of court those duties which may be assigned to magistrates within the district, as a precondition to the performance of such "additional duties." The files of this office do not reflect the adoption of such rules by the United States District Court for the District of Utah.

COURT PROFILE

DISTRICT OF UTAH

I. Positions Presently Authorized

Location ---------- Salt Lake City/Ogden.
Number ---------- 1.
Type ---------- Part-time.
Authorized salary ---------- $15,000.
Expiration of term ---------- June 20, 1970.

II. Geography

Area: 84,916 square miles.
Population: 1,059,273 (1970).
Principal Federal Enclaves: Hill Air Force Range, Wendover Air Force Range, Dugway Proving Ground, Tooele Ordinance Depot, Zion National Park, Bryce Canyon National Park, Canyonlands National Park, Great Salt Lake, Fish Springs National Wildlife Refuge, Ouray National Wildlife Refuge.
National Monuments: Rainbow Bridge, Natural Bridges, Dinosaur, Arches, Cedar Breaks, Capital Reef.
Indian Reservations: Skull Valley, Unitah, Ouray, Navaho.
National Forests: Sawtooth, Cache, Wassatch, Fishlake, Unitah, Dixie, Mantila Sal.

III. Judgeships

Authorized Judgeships—2

Authorized places of holding:	Population:	Resident judges:
Salt Lake City	175, 885	2
Ogden	69, 478	—

IV Total Caseload of the Court—Fiscal Year 1975

Civil cases		*Criminal cases*	
Filed	517	Filed	144
Terminated	403	Terminated	107
Pending	499	Pending	92
		(With fugitive defts)	10

V. STATISTICAL PROFILE PER JUDGESHIP—FISCAL YEAR 1975

	District	National average	Numerical standing
Civil cases filed	259.0	294.0	55
Criminal cases filed	72.0	108.0	72
Total cases terminated	255.0	371.0	77
Total cases pending	296.0	355.0	59
Total weighted caseload	373.0	400.0	56
Total trials	27.0	48.0	85
Median disposition, times in months:			
Civil cases	8.0	9.0	27
Criminal cases	3.5	3.6	46

DISTRICT OF UTAH

CIVIL CASES COMMENCED BY NATURE OF SUIT

	Fiscal year—				
	1971	1972	1973	1974	1975
Total	385	393	475	441	517
Total, U.S. cases	97	104	137	98	103
Contract	29	20	26	6	13
Land condemnation	1	3	1	1	
Other real property	4	3	3	2	3
Tort actions	9	23	14	6	13
Antitrust					1
Civil rights	(1)	1	7	7	4
Prisoner petitions:					
Habeas corpus	4	3	4	2	1
Civil rights	(1)		1		
Other	6	1	1	1	3
Forfeitures and penalties	7	11	24	12	18
Labor suits	7	11	11	10	11
NARA	(1)	5	4		1
Social security	(1)	2	4	9	15
Tax suits	3	12	17	15	6
All other	27	9	20	27	14
Total, private cases	288	289	338	343	414
Contract	55	66	67	71	96
Real property	7	3	1	4	3
Federal Employers' Liability Act	1	7	3	8	18
Marine personal injury				3	
Motor vehicle personal injury	39	24	37	45	36
Other personal injury	25	28	32	33	45
Other tort actions	6	1	8	7	8
Antitrust	11	8	11	14	28
Civil rights	(1)	32	36	43	52
Commerce	(1)	3	5	3	1
Prisoner petitions:					
Habeas corpus	41	32	39	14	8
Civil rights	(1)	10	17	4	7
Other	8				
Copyright, patent, and trademark	6	5	10	8	8
Labor suits	21	17	17	23	30
All other	68	53	55	63	74

See footnotes at end of table.

DISTRICT OF UTAH—Continued

CRIMINAL CASES COMMENCED BY NATURE OF OFFENSE[2]

	Fiscal year—				
	1971	1972	1973	1974	1975
Total	90	146	97	112	138
General offenses:					
Homicide			1	3	
Robbery	2	7	3	4	10
Assault	3	8	2		1
Burglary		2		1	1
Larceny and theft	17	11	17	14	28
Embezzlement	7	10	4	13	16
Fraud	9	24	14	22	33
Auto theft	16	12	3	9	8
Forgery and counterfeiting	19	22	25	11	20
Sex offenses		2	1	12	
Narcotics laws		3	6	9	2
Weapons and firearms	(1)	6	2	3	7
Other general offenses	6	9	6	4	1
Special offenses:					
Immigration laws	2	1		1	
Liquor, internal revenue					
Selective Service Act	2	7	1		
Other Federal statutes	7	22	12	6	11

[1] Not available.
[2] Excludes transfers.

Surveys of Magistrate Positions Administrative Office of the United States Courts

DISTRICT OF UTAH

June 1974.

I. PURPOSE OF SURVEY

The initial four-year terms of the part-time magistrates at Salt Lake City and Ogden are due to expire on June 29, 1975. The positions are being reviewed to determine (a) whether they should be continued for additional terms, and (b) whether there should be any changes in salaries and arrangements.

II. WORKLOAD OF THE MAGISTRATES

The workload of the two part-time magistrates in the district has consisted almost entirely of precommitment proceedings in criminal cases. Though Utah encompasses a number of federal owned lands, the magistrates to date have only disposed of a handful of minor and petty offense cases. The nature and the volume of their duties have been substantially less than anticipated at the time when their salaries were originally set by the Judicial Conference.

(a) *Salt Lake City ($12,572)*

Salt Lake City is the headquarters of the court and the residence of both the district judges. The following magistrate activity has been reported here during the last two and one-half fiscal years:

	Fiscal year —		
	1972	1973	1974 (6 mo)
Petty offenses	1	(—)	9
Number of trials	(1)	(—)	(—)
Search warrants	15	8	7
Arrest warrants	106	92	44
Bail hearings	117	109	59
Bail reviews	4	8	2
Preliminary exams	29	27	9
Removal hearings	2	8	1

Although it had been anticipated that "additional duties" would be assigned to the magistrate, this has not occurred. As a result, the volume of business is a good deal less than that coming before other part-time magistrates receiving comparable salaries. There is, unfortunately, no alternative to recommending a reduction in the authorized compensation of the position at Salt Lake City during a new term.

It is recommended (a) that this position be continued for an additional four-year term, and (b) that its salary be reduced from $12,572 to $6,000 per annum.

(b) *Ogden* ($9,394)

Ogden is 30 miles north of Salt Lake City and is also a place of holding court. The part-time magistrate here has reported performing the following duties:

	Fiscal year —		
	1972	1973	1974 (6 mo)
Minor offenses		1	
Number of trials	(—)	(—)	(—)
Petty offenses	5	3	
Number of trials	(5)	(—)	(—)
Search warrants	9	9	1
Arrest warrants	58	59	30
Bail hearings	56	49	26
Bail reviews	4		1
Preliminary examinations	16	19	5
Removal hearings	11	6	1

The volume of magistrate activity at Ogden has been consistent, but is out of line with the salary of the position. It is recommended (a) that the position be continued for an additional four-year term, and (b) that its authorized salary be reduced from $9,394 to $3,600 per annum.

I. POSITIONS PRESENTLY AUTHORIZED

Location	Number	Type	Authorized salary	Expiration of term
Salt Lake City	1	Part time	$12,572	June 29, 1975
Ogden	1	do	9,394	Do.

II. GEOGRAPHY

Area: 84,916 sq. miles.

Population: 1,059,273 (1970).

Principal Federal Enclaves: Hill Air Force Range, Wendover Air Force Range, Dugway Proving Ground, Tooele Ordnance Depot, Zion NP, Bryce Canyon NP, Canyonlands NP, NM: Rainbow Bridge, Natural Bridges, Dinosaur, Arches, Cedar Breaks, Capital Reef.

Great Salt Lake.

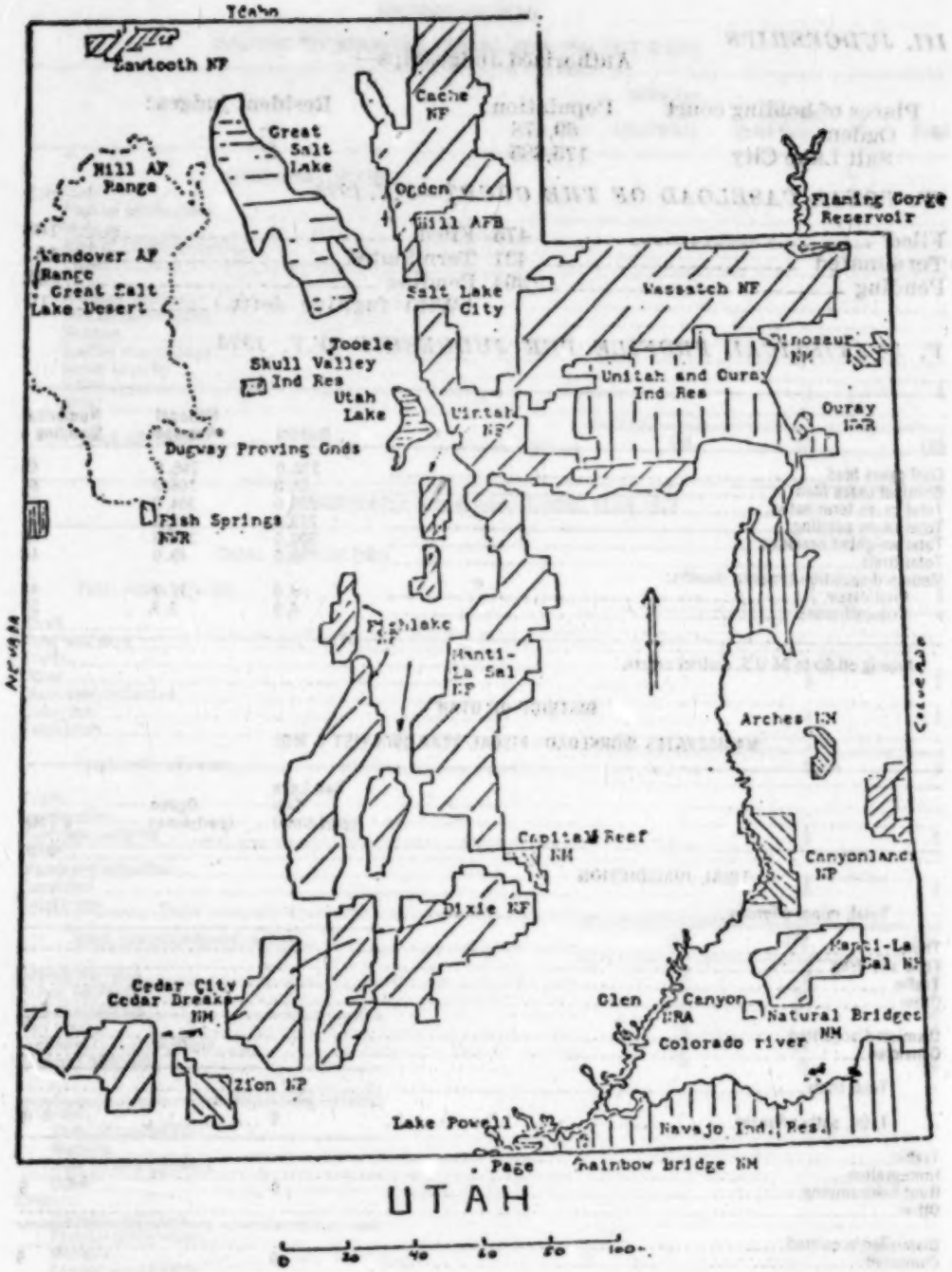
Glen Canyon National Recreation Area, Skull Valley IR, Uintah and Ouray IR, Navajo IR.

National Forests:

Sawtooth, Cache, Wassatch, Fishlake, Mantila Sal, Dixie, Uintah.

Fish Springs National Wildlife Refuge.

Ouray National Wildlife Refuge.



III. JUDGESHIPS

Authorized Judgeships—

Places of holding court	Population:	Resident judges:
Ogden	69,478	—
Salt Lake City	175,885	2

IV. TOTAL CASELOAD OF THE COURT—F.Y. 1973

Filed	475	Filed	108
Terminated	421	Terminated	131
Pending	394	Pending	43
		(With fugitive defts.)	10

V. STATISTICAL PROFILE PER JUDGESHIP—F.Y. 1973

	District	National Average	Numerical Standing [1]
Civil cases filed	238.0	246.0	45
Criminal cases filed	54.0	106.0	84
Total cases terminated	276.0	354.0	72
Total cases pending	219.0	314.0	66
Total weighted caseload	300.0	343.0	66
Total trials	50.0	49.0	44
Median disposition times in months:			
Civil cases	9.0	10.0	41
Criminal cases	4.5	3.9	55

[1] Among all 90 to 94 U.S. district courts.

DISTRICT OF UTAH

MAGISTRATES WORKLOAD—FISCAL YEAR 1974 (1ST 6 MO)

	Salt Lake City (part-time)	Ogden (part-time)	Total
TRIAL JURISDICTION			
Total, minor offenses			
Theft			
Food and drug			
Traffic			
Other			
Dismissed/acquitted			
Convicted			
Total trials			
Total, petty offenses	9		9
Traffic			
Immigration			
Hunt/fish/camping	9		9
Other			
Dismissed/acquitted			
Convicted	9		9
Total trials			
Total, precommitment matters	122	64	186
Search warrants	7	1	8
Arrest warrants	44	30	74
Bail proceedings	59	26	85
Bail review	2	1	3
Preliminary examinations	9	5	14
Removal hearings	1	1	2

DISTRICT OF UTAH

MAGISTRATES WORKLOAD—FISCAL YEAR 1974 (1ST 6 MO)

	Salt Lake City (part-time)	Ogden (part-time)	Total
ADDITIONAL DUTIES			
Criminal:			
Pretrial conferences			
Motions			
Rule 10 arraignments			
Other			
Civil:			
Prisoner petitions			
Pretrial conferences			
Motions			
Special masterships			
Social security			
NARA		1	1
Other			
Total, all matters	131	65	196

MAGISTRATES WORKLOAD—FISCAL YEAR 1973

	Salt Lake City (part-time)	Ogden (part-time)	Total
TRIAL JURISDICTION			
Total, minor offenses		1	1
Theft			
Food and drug			
Traffic			
Other		1	1
Dismissed/acquitted			
Convicted		1	1
Total trials			
Total, petty offenses		3	3
Traffic			
Immigration			
Hunt/fish/camping		3	3
Other			
Dismissed/acquitted			
Convicted		3	3
Total trials			
Total, precommitment matters	252	142	394
Search warrants	8	9	17
Arrest warrants	92	59	151
Bail proceedings	109	49	158
Bail review	8		8
Preliminary examinations	27	19	46
Removal hearings	8	6	14
ADDITIONAL DUTIES			
Criminal:			
Pretrial conferences			
Motions			
Rule 10 arraignments			
Other			
Civil:			
Prisoner petitions			
Pretrial conferences			
Motions			
Special masterships			
Social security			
NARA			
Other			
Total, all matters	252	146	398

MAGISTRATES WORKLOAD—FISCAL YEAR 1972

TRIAL JURISDICTION			
Total, minor offenses			
Theft			
Food and drug			
Traffic			
Other			
Dismissed/acquitted			
Convicted			
Total trials			
Total, petty offenses	1	5	6
Traffic			
Immigration		5	5
Hunt/fish/camping	1		1
Other			
Dismissed/acquitted	1	5	6
Convicted			
Total trials	1	5	6
Total, precommitment matters	273	154	427
Search warrants	15	9	24
Arrest warrants	106	58	164
Bail proceedings	117	56	173
Bail review	4	4	8
Preliminary examinations	29	16	45
Removal hearings	2	11	13
ADDITIONAL DUTIES			
Criminal:			
Pretrial conferences			
Motions			
Rule 10 arraignments			
Other			
Civil:			
Prisoner petitions			
Pretrial conferences			
Motions			
Special masterships			
Social security			
NARA			
Other			
Total, all matters	274	159	433

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT,
April 19, 1976.

To: Hon. David T. Lewis, Chief Judge.
From: Emory G. Hatcher.
Subject: Juror Utilization, District of Utah.

Attached hereto is a letter to you with reference to juror utilization in the District of Utah. Unfortunately, it is not too definitive because, first, the Administrative Office did not receive all of the statistical reports from the District during some of the years in question, and, second, the statistics do not distinguish between the statistics of the two judges in the District.

There has been a marked improvement by the District from the first to the last report. According to Veri Ritchie, this is largely due to Judge Anderson's handling of his juries. Judge Ritter has continued to function in exactly the same way with respect to his juries.

Attachments.

Hon. DAVID T. LEWIS,
Chief Judge,
U.S. Courts of Appeals,
Federal Building,
Salt Lake City, Utah

DEAR CHIEF JUDGE LEWIS: The following is a summation of the utilization of both petit and grand jurors in the District of Utah for the years 1972 to 1975, inclusive. The statistics were compiled from information provided in the publication entitled *Juror Utilization in United States District Courts* published annually by the Administrative Office commencing in 1972, although data concerning Grand Jury activity was not available until 1975.

PETIT JURY

The enclosed table represents the utilization profile of petit jurors in the nation as a whole compared with the District of Utah. Some explanation of the figures and inconsistencies are necessary for a better understanding of the juror usage.

The Juror Usage Index is the total available juror days divided by the total number of jury trial days. This figure was slightly higher in 1975 due to a reporting change.

In 1971–1974, only sworn jurors were to be counted as serving. This category now includes all jurors selected to serve on a trial jury at a future date as well as in trials in progress.

Trial days were to be counted only on the day the jury actually began service. This corrected the statistical disparity which arose from counting a jury trial from the initial swearing in of the jurors.

All of the 1973 figures are only from Judge Aldon J. Anderson's court. The statistics for Judge Willis W. Ritter's court were not available.

There are 94 Districts. The "rank" column indicates where in relationship to the other Districts Utah rates statistically.

There has been a marked improvement in the utilization of petit jurors in Utah. Although the nation as a whole has shown better usage of jurors, Utah's improvement is at a higher rate than the national average.

GRAND JURY

Data concerning Grand Jury activity was available for the first time in 1975. Due to the limited scope of this information, it is difficult to conclude if the following figures are indicative of a trend or merely a reflection of a single year.

Efficient management of Grand Jury time involves setting as many cases as possible to be heard per session. The result would be an increase in the average hours per session but a decrease in cost (i.e., mileage cost would be less with fewer sessions).

Utah falls short of the national average in both the number of cases heard and the number of hours per session. On the average, it is taking the Utah Grand Jury six hours to hear a single case while the national average is 1.5 hours per case.

From the information available, it is impossible to tell whether the Utah Grand Jury is taking four times as long per case due to the nature of the material or if this delay is partially the result of poor management.

The cost per session in Utah is higher than the national average, as is the number of jurors per session.

The following figures reflect Utah's Grand Jury Usage in comparison with the nation:

	Utah	National
Number of grand jury sessions	39	7,846
Number of cases	32	26,775
Average number of cases per session	0.8	3.4
Average number of hours per session	4.8	5.2
Average number of jurors	21.7	19.9
Average cost per session	$549	$506
Average cost per juror day	$25	$25

Sincerely yours,

EMORY G. HATCHER.

Enclosure.

UTILIZATION PROFILE OF PETIT JURORS 1972–75, DISTRICT OF UTAH

	Year	Utah	National average	Rank
Juror usage index	1972	21.11	20.88	62
	1973	24.42	20.16	81
	1974	21.40	19.12	71
	1975	18.78	19.32	44
Cost per jury trial day	1972	(1)	514	(1)
	1973	(1)	498	(1)
	1974	524	585	76
	1975	508	490	56
Cost per juror day	1972	58.26	24.78	94
	1973	(1)	24	(1)
	1974	26	25	51
	1975	27	25	58
Percentage not selected, serving or challenged	1972	20.9	29.9	(1)
	1973	25.0	28.4	47
	1974	27.6	26.5	63
	1975	21.3	23.8	48
Percentage selected or serving	1972	61.0	55.5	38
	1973	51.9	56.5	68
	1974	61.3	58.3	41
	1975	64.9	60.1	29

1 Not available. Reports not transmitted to administrative office where indicated.

UNITED STATES DISTRICT COURT,
DISTRICT OF UTAH,
Salt Lake City, Utah, May 14, 1976.

Hon. QUENTIN N. BURDICK,
Chairman, U.S. Senate, Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery, Washington, D.C.

DEAR SENATOR BURDICK: I acknowledge receipt of your letter to me dated April 27, 1976, in which you request me to appear on May 18, 1976, before the Subcommittee on Improvements in Judicial Machinery to testify with respect to S. 1130 introduced by one United States Senator, Mr. E. J. Garn of Utah. You note in your said letter that the reason for the request that I appear is my status "as the last of the 32 judges who were exempted from the age limitation" ["grandfather clause" of P.L. 85-593 relating to the age 70 limitation upon service as a chief judge] and that I am the "sole Chief Judge who would be affected by such as repealer". The only issue before your Subcommittee is my status in the administrative office of Chief Judge of the District of Utah.

In sponsoring the bill, Senator Garn has asserted as a principal reason for introducing the measure that as Chief Judge, I have the responsibility for assignment of cases between myself and the other judge of the District of Utah. Senator Garn is mistaken, since the entire assignment process in Utah is controlled wholly by a special order of the Judicial Council of the Tenth Circuit dated January 20, 1958, as amended by Orders dated May 3, 1962 and May 24, 1965, copies of which are annexed, marked Exhibit "A". Therefore, your Committee is faced with the issue involving my administrative office and the acknowledged fact that the proposed law is directed solely at me in contravention of a "grandfather clause" which was allowed to apply totally to the chief judge office of 31 other judges originally covered by the clause.

I am deeply concerned about the constitutionality of S. 1130 which would amend the Act of August 6, 1958 (28 U.S.C. § 136) relating to service as chief judge of a United States District Court. As you know, Congress determined in that Act that no federal district court judge should hold the office of chief judge past the age of 70. Congress, however, specifically exempted from the mandatory retirement provision those judges in two-judge districts already serving as chief judge as of August 6, 1958. S. 1130 would repeal that exemption. I believe such an attempt appears to constitute a Bill of Attainder and is thus expressly prohibited by the Constitution. (Art. 7, § 9, Cl. 3).

The Supreme Court has delned Bills of Attainder as any "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ." *United States* v. *Lorett*, 328 U.S. 303, 315-6 (1946). The punishment inflicted need not be imprisonment or a fine.

"The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. *Disqualification from office may be punishment*, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment." *Cummings* v. *Missouri*, 4 Wall. at 320, 18 L.Ed. at 362. (Emphasis added.)

The Supreme Court has concluded that such Bills of Attainder were prohibited by the Constitution for two purposes: First, to implement the doctrine of the separation of powers; and, second, because regardless of the need for a separation of powers, the legislature is simply not "well-suited to the task of ruling upon the blameworthiness of, and levying the appropriate punishment upon, specific persons." *U.S.* v. *Brown*, 381 U.S. 437, 445 (1965).

Senate Bill 1130 appears to violate both of those purposes. It violates the separation of powers by involving Congress in an effort to discipline or punish a member of the federal judiciary, even though the only explicit disciplinary power over judges given to Congress by the Constitution is the power to remove judges by impeachment. (Art. 2, § 4 and Art. 1, §§ 2 and 3).

I respectfully urge you therefore to reject S. 1130 as a Bill of Attainder.

The fundamental rules involving separation of powers and the pressure and the business of the court preclude my personal appearance at this time. Therefore, acknowledging respect for you, for your Committee and the legislative process, I respectfully decline your thoughtful request to appear and forward this letter in lieu of a personal appearance. However, I ask you to read this letter into the record of the proceedings and thank you in advance for your courtesy. In addition, I ask that you keep the record open after the formal hearing so that I may be provided an opportunity to supplement the record or even to make a personal appearance should I deem it necessary to protect the record of these proceedings.

The Committee should know that my office of Chief Judge involves administrative duties in three major categories, i.e., the Office of the Clerk of the Court, the Office of Referee in Bankruptcy and the Office of Probation.

The Clerk's Office is functioning effectively under procedures designed to facilitate the maintenance of current court calendars (see Schedules 1, 2, 3, 4, 5 and 6, annexed), prompt notification to members of the Bar of hearings and developments (see Exhibit "B" annexed) and orderly preparation of records on appeal (see Exhibit "C" annexed).

I enclose the following information as to the condition of my calendar as a means of demonstrating underlying efficiency in the Clerk's Office and policies which expedite litigation. As of May 10, 1976, Schedule 1 shows the number of criminal cases pending on my calendar and the year the cases were filed; Schedule 2 shows the number of civil cases pending on my calendar and the year the cases were filed; and Schedule 3 describes each pending case and its present status. It is apparent that my calendar is absolutely current and that the very few holdover cases from prior years (1968–2 criminal; 1969–1 civil; 1970–3 civil; 1971–1 civil; 1972–0; 1973–1 criminal, 8 civil; 1974–5 criminal, 19 civil; 1975–7 criminal, 118 civil; 1976–15 criminal, 61 civil) involve extraordinary circumstances in no way related to a failure of the administration of the Chief Judge. In a similar vein, Schedule 4 shows the number of cases on my calendar which have been closed for the calendar year 1975 (158 criminal and 177 civil) and for the first four months of 1976 (43 criminal and 114 civil). Finally, Schedule 5 shows the heavy workload of the court and the results of the case assignment orders promulgated by the Judicial Council of the Tenth Circuit.

Because the role of the Chief Judge involves practices and policies in the Clerk's Office which would affect the progress of cases in both United States District Courts for the District of Utah, I enclose Schedule 6, which compares the status of the calendar for United States District Courts for the District of Utah to such calendars in other states within the area of the Tenth Circuit Court of Appeals (excluding the unrepresentative State of Oklahoma) and the states within the Ninth Circuit Court of Appeals (excluding the unrepresentative State of California). With respect to pending cases, the percentage of cases pending three years or more, the median time from filing a case to disposition and the median time from the time the case is at issue to trial of the case, all demonstrate that the District of Utah has a clear edge over most of the other states within the Ninth and Tenth Circuits (see Schedule 6, italicized numerals). At the very least, these data demonstrate conclusively that the status of litigation in Utah is satisfactory, even exemplary.

One power of the Chief Judge is the power of appointment.

I am vitally concerned with the quality of my appointments.

The major appointments in this jurisdiction are the Referee in Bankruptcy, now called Bankruptcy Judge, and the Chief Probation Officer of the Probation Office.

Bruce S. Jenkins, the Bankruptcy Judge of the United States District Court for the District of Utah, was first appointed in 1965.

He came to the court with a distinguished record of a scholar, a lawyer, and a legislator. His work as a State Senator and former President of the Utah State Senate, was commended by students of government, colleagues and news media. His pioneering effort in state government reorganization culminated in a major reorganization of the executive branch of the Utah State Government.

During his tenure on the bankruptcy bench, a most difficult assignment, he has achieved the acceptance and respect of the commercial and credit community, members of the Bar, the university community and colleagues nationwide.

At the 1975 convocation, University of Utah Law School, he was honored by unanimous action of the faculty and the Utah Chapter of the Order of Coif by being made the Order of Coif designate for 1975—the only judicial officer so honored in 1975. He was so honored in part, because of his work as Bankruptcy Judge and his contribution "to the law of the state and the nation."

As a member of the National Conference of Bankruptcy Judges, he was a member of its Board of Governors and three times chaired its Committee on Practice and Procedure.

During his tenure as Bankruptcy Judge, he has processed about 14,000 cases and hundreds of proceedings within such cases. He has handled from 1,052 to 1,625 cases per year with an average of about 1,316 cases per year.

He has lectured widely before credit groups, Bar Associations and seminars.

His calendar is current. Indeed, he has consistently been commended by the Bankruptcy Division of the Administrative Office of the United States Courts for the excellence of his performance and that of the Bankruptcy Court staff.

Mr. B. A. Rhodes, the Chief Probation Officer, is a man with over twenty years experience in the field of probation. A graduate of the University of Houston, Houston, Texas, Mr. Rhodes has a B.S. degree in Sociology. After five years with the Harris County Juvenile Court System in Houston, Texas, he was later hired through the Utah State Merit System in 1961 and became a Juvenile Probation Officer for the State of Utah. Mr. Rhodes came to work for the District Courts of Utah in 1962, and was appointed Chief Probation Officer for the District of Utah in 1965.

Over the past three years a small staff of probation officers have completed a total of 912 investigations for the courts, prison system, and the United States Board of Parole, 267 of which were presentence reports for the District of Utah. They presently supervise and administer to 260 probationers and parolees monthly. All matters in the office are treated promptly and effectively.

We have what is recognized as one of the finest probation offices in the country, an opinion supported by attorneys in the District of Utah, law enforcement, and members of the social service discipline from diverse areas.

The Congress is being led into a futile and wasteful quest. The proposed law has all the aspects of an unconstitutional Bill of Attainder. The "grandfather clause" is applicable only to districts with two judges, not the districts with three or more judges (see Public Law 85-593, § 3, 62 Stat. 897). Consequently, the whole question would become moot upon an Act of Congress creating a third district court judge for the District of Utah, a problem which does need long overdue congressional attention.

The real dimension of this attack is plain when you consider that the "grandfather clause" automatically expires by its own terms as soon as a third judge is appointed for Utah.

That should be in the next judge bill to be considered by this very Committee. The sponsoring senator could have been doing something constructive and of lasting benefit for his state, if he had been working for a third federal judgeship for Utah.

I hope the foregoing statement will be of aid to your Committee and will help you to turn your attention to important problems confronting the Congress of the United States.

Respectfully submitted,

WILLIS W. RITTER.

EXHIBIT "A"

IN THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

January Session—1958

IN THE MATTER OF THE DIVISION OF BUSINESS AND ASSIGNMENT OF CASES IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

ORDER

A formal request, together with data in support thereof, to divide the business and assignment of cases in the United States Court for the District of Utah was submitted to the Judicial Council. The Council considered the matter at a meeting held in Denver, Colorado, on December 2, 1957, and considered it further at a meeting held in Denver on January 8, 1958. All members of the Council were present and participated in both meetings. At the meeting held on January 8, the Chief Judge and the Associate Judge of the Court for the District of Utah were present in person; each submitted an extended verbal statement; and the Chief Judge submitted a statement in writing.

The Council Finds:

(1) The Judges of the United States District Court for the District of Utah are unable to agree upon the adoption of rules or orders for the division of the business of, and the assignment of cases pending in, that Court; and

(2) The effective and expeditious administration of the business of the United States District Court for the District of Utah requires the Council to make this order under the power and authority granted to it by 18 U.S.C. §§ 137 and 332.

Accordingly, it is ORDERED:

(1) For the purpose of the division of business and the assignment of cases made herein the Judge of the United States District Court for the District of Utah who is senior in commission is designated as "Chief Judge" and the other Judge is designated as "Associate Judge."

(2) All cases which are filed before the effective date of this order shall be assigned in accordance with the practice now existing in the Court. All business arising, and all cases filed, on and after the effective date of this order shall be divided and assigned as herein provided.

(3) All criminal proceedings, including cases instituted under the Federal Juvenile Delinquency Act, removal cases, and complaints for the apprehension of material witnesses, are assigned to and shall be handled by the Chief Judge in each even numbered calendar year and are assigned to and shall be handled by the Associate Judge in each odd numbered calendar year. The Judge to whom the criminal proceedings are assigned in any calendar year shall have full control over and responsibility for the call and discharge of grand juries, the return of indictments, arraignments, cases under the Federal Juvenile Delinquency Act, complaints for the apprehension of material witnesses, and all other criminal proceedings. All cases arising either by indictment returned or information filed during the period in which a particular Judge is assigned to handle criminal proceedings shall remain assigned to that Judge even though they are not concluded within such period. Proceedings under 28 U.S.C. § 2255 are assigned to and shall be handled by the Judge who imposed the sentence involved therein.

(4) All proceedings under the bankruptcy laws of the United States, under the immigration laws of the United States, and under the naturalization laws of the United States, except criminal proceedings arising under such bankruptcy, immigration, or naturalization laws, are assigned to and shall be handled by the Chief Judge in each odd numbered calendar year and are assigned to and shall be handled by the Associate Judge in each even numbered calendar year. All proceedings instituted under either the bankruptcy laws, the immigration laws, or naturalization laws during the period in which a particular Judge is assigned to handle such proceedings shall remain assigned to that Judge even though they are not concluded within such period.

(5) (a) The term "civil cases" when used herein shall include all cases and proceedings other than criminal, bankruptcy, immigration, naturalization, and 28 U.S.C. § 2255 cases and proceedings. Every civil case when filed shall be given and identifying number and shall forthwith be assigned to one of the Judges of the Court as herein provided.

(b) For the assignment of civil cases the Clerk shall prepare a set of not less than fifty nor more than one hundred cards. On one-half of such cards the designation "Chief Judge" shall appear and on the other one-half thereof the designation "Associate Judge" shall appear. The Clerk shall also prepare a

set of envelopes equal in number to that of the cards. The envelopes shall be made of material which is not transparent and shall be numbered in sequence beginning with the number of the first civil case filed on or after the effective date of this order. The cards shall then be so mixed that the cards bearing the designation "Chief Judge" and the cards bearing the designation "Associate Judge" shall be in irregular and unknown sequence. One card shall be inserted in each envelope in such manner that no one shall know the designation appearing on such card. The envelopes shall then be sealed, placed in numerical sequence and kept by the Clerk in a safe place. As each civil case is filed the Clerk shall take the envelope bearing the docket number of that case and remove the card therefrom. The case then becomes assigned to the Judge whose designation appears on such card. Both the envelope and the card shall be affixed to the file cover of the case. As required, the Clerk shall prepare and use new sets of cards and envelopes. The sequence of numbers on each new set of envelopes shall begin with the number which follows in sequence the last number of the previous set. The Clerk shall administer this method of assignment so as to prevent any predetermination of the Judge to whom a case shall be assigned and so as to bring about an equal division of the civil cases between the two Judges.

(c) No order shall be entered in any civil case until it is filed and assigned except:

(i) An application to proceed in forma pauperis in any civil case shall be heard and determined by the Chief Judge if he is available and otherwise by the Associate Judge.

(ii) If any civil case is filed with a Judge as permitted by Rule 5(e) of the Federal Rules of Civil Procedure and such case requires immediate action, the Judge with whom the case is filed may take such action as he deems appropriate and then shall forthwith transmit the papers in the case to the Clerk for docketing and assignment as herein provided.

(d) When civil cases involving a common question of law or fact are assigned to different Judges and a consolidation is proper under Rule 42 of the Federal Rules of Civil Procedure, either Judge may order a consolidation. Such consolidated action then becomes assigned to the Judge to whom was assigned the consolidated case bearing the lowest docket number.

(6) If a Judge is disqualified to act, or recuses himself, in any case or proceeding assigned to him, the case or proceeding shall then be assigned to the other Judge.

(7) If immediate action is necessary in any case or proceeding assigned to a particular Judge and that Judge is unavailable for any reason, the other Judge shall hear and dispose of the matter requiring immediate attention but such action shall not constitute a re-assignment of the case or proceeding.

(8) The division of business and assignment of cases made herein may be altered or modified by written order signed by both Judges and filed with the Clerk.

(9) The effective date of this order is February 20, 1958.

(10) An original copy of this order shall be retained in the records of the Council; a duplicate original shall be forthwith transmitted to the Clerk of the United States Court for the District of Utah to be imbedded in the records of the court; a copy shall be forthwith transmitted to the Chief Judge of the Court for the District of Utah; and a copy shall be forthwith transmitted to the Associate Judge of such Court.

DONE by the Judicial Council of the Tenth Circuit this 20th day of January, 1958.

SAM C. BRATTON,
Chief Judge.

ALFRED MURRAH,
Circuit Judge.

JOHN C. PICKETT,
Circuit Judge.

DAVID T. LEWIS,
Circuit Judge.

JEAN S. BREITENSTEIN,
Circuit Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

Northern Division

IN THE MATTER OF THE DIVISION OF BUSINESS AND ASSIGNMENT OF CASES IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

ORDER

During the year one of the judges of the court has the criminal calendar, that judge also shall have assigned to him all of the civil cases filed in the Northern Division.

The Order of the Judical Council of the Tenth Circuit dated January 20, 1958, is hereby amended to conform to the foregoing order.

This amendment shall take effect upon the signing of this order by both judges and filing with the clerk and shall govern cases filed after the effective date.

Done this 3rd day of May, 1962.

_____, _____,
Chief Judge.

_____, _____,
Associate Judge.

IN THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT OF THE UNITED STATES

March Session—1965

IN THE MATTER OF THE DIVISION OF BUSINESS AND ASSIGNMENT OF CASES IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

ORDER

A request having been made that the order of the Judicial Council dated January 20, 1958, and pertaining to the division of business and assignment of cases in the United States District Court for the District of Utah, be modified and amended, and the Council having fully considered such request at meetings held upon March 22 and 25, 1965, at Denver, Colorado, the Council now

Finds:

1. The order of the Judicial Council dated January 20, 1958, was, in accord with paragraph (8) thereof, amended by order of the District Court dated May 3, 1962, and, as amended, is in full force and effect. Further reference to such order shall include the amendment of May 3, 1962.

2. The effective and expeditious administration of the business of the United States District Court for the District of Utah requires that such order be amended and thus requires the Council to make this order under the power and authority granted to it by 28 U.S.C. §§ 137 and 332.

Accordingly, it is ordered:

That the order of the Judicial Council is amended to provide as follows:

1. During both even and odd numbered calendar years all criminal cases and proceedings in the Central Division of the District of Utah shall be assigned to the Chief Judge.

2. During both even and odd numbered calendar years all cases and proceedings of whatever kind or nature in the Northern Division of the District of Utah shall be assigned to the Associate Judge.

3. The said assignments shall be automatically made notwithstanding other provisions of the order of the Judicial Council; but except as necessarily changed by this amendment the assignments, procedures, rules and other provisions of the order of the Judicial Council shall remain in full force and effect.

4. This amendment shall become effective on January 1, 1966.

Dated this 24th day of May, 1965.

_____, _____,
Chief Judge.

JOHN C. PICKETT,
Circuit Judge.

_____, _____,
Circuit Judge.

_____, _____,
Circuit Judge.

_____, _____,
Circuit Judge.

_____, _____
Circuit Judge.

EXHIBIT "B"

AFFIDAVIT

STATE OF UTAH,
County of Salt Lake, ss:

I, Hana Shirata, Deputy Clerk of the United States District Court, being first duly sworn, do hereby make the following statements:

Duties in the Clerk's Office are many and varied. Certain matters, however, take precedence and are expeditiously taken care of. Such matters include (1) notification of counsel relative to orders signed by the court in their cases, and (2) notices to counsel of matters set down for hearing. It is the practice of this office to see that such notices to counsel are mailed out immediately upon receipt of the signed orders, the setting of a hearing date, or designation of a motion day.

Any situation in which emergency action is required by the court, such as Temporary Restraining Orders, emergency Petition for Writ of Habaeas Corpus in civil cases and bond hearings in criminal matters are immediately set down for prompt disposition and generally disposed of as soon as counsel involved can be notified, usually by telephone, to appear for hearing.

I am generally aware of the matters that transpire in the Clerk's Office and very seldom are any complaints received from members of the Bar or other courts about the manner in which the office is administered. When such complaints have been made, they have been given prompt and due consideration and appropriate action taken to remedy the problem. No complaints, to my knowledge, as to the administration of this office have been received from the Clerk's Office of the Tenth Circuit Court of Appeals. Whenever suggestions have been received from the Clerk's Office of the Tenth Circuit Court of Appeals relative to records on appeal, the suggestions have received prompt attention and have been achieved.

HANA SHIRATA,
Deputy Clerk.

Subscribed and sworn to before me this 13th day of May 1976.

ALAN H. JENKINSON,
Notary Public.

My Commission Expires: November 15, 1977.

EXHIBIT "C"

AFFIDAVIT

STATE OF UTAH,
County of Salt Lake, ss:

I, Ruth Bailey, Deputy Clerk in the United States District Court for the District of Utah, do hereby make the following statement:

Records on appeals in most cases are prepared and transmitted to the Tenth Circuit Court of Appeals by the end of the forty-day period allowed after the filing of notice of appeal. Sixty days is allowed for transmittal of a record to

the Supreme Court of the United States. Reporters' transcripts of proceedings are usually prepared within the time allowed. However, in some cases an extension is granted to allow the reporter to complete a transcript.

RUTH BAILEY,
Deputy Clerk.

Subscribed and sworn to before me this 13th day of May 1976.

ALAN H. JENKINSON,
Notary Public.

My Commission Expires: November 15, 1977.

SCHEDULE 1

U.S. DISTRICT COURT FOR THE DISTRICT OF UTAH, WILLIS W. RITTER, CHIEF JUDGE—CALENDAR STATUS
CRIMINAL CASES

Year	Cases pending	Description
1968	2	Both secret indictments, defendants fugitives.
1973	1	Defendant a fugitive.
1974	5	Defendants fugitives in 2 cases. N Cr 74-22, Francis C. Lund (problem of extradition; tax evasion charge). Cr 74-53, William Allen (awaiting sentence). Cr 74-54, Milton Rich (retrial, hung jury before Judge Halbert).
1975	7	Defendant fugitive in 1 case. Includes 2 cases in which circuit has stayed all proceedings: Cr 75-76, Countryside Farms, et al. Cr 75-120, Lansing and Farley.
1976	15	3 cases awaiting trial.
Total	30	

SCHEDULE 2

U.S. DISTRICT COURT FOR THE DISTRICT OF UTAH, WILLIS W. RITTER, CHIEF JUDGE—CALENDAR STATUS,
CIVIL CASES

Year	Cases pending	United States	Private	Description
1968	1	.....	1	C 327-69, American Oil v. McMillan (retrial mandate).
1970	3	1	2	C 21-70, James Jim v. State of Utah (hearing on determination of disposition of case). C 171-70, U.S. v. Paul E. Reiman (property needs to be resurveyed—mandate). C 274-70, Donald Boyd Julander v. Ford Motor (retrial—mandate).
1971	1	.....	1	C 29-71, Walter E. Bronson v. American Metal Climax (ruling on 3d party complaint of American Metals v. Silver Bell—per mandate).
1973	8	2	6	
1974	[1] 19	4	15	
1975	118	30	88	
1976	61	16	45	
Total	211	53	158	

[1] Includes 3 cases already tried—awaiting filing of memos: C 74-171, Jack Wimmer v. USA and Stevenson (disposition as to USA). C 74-184, Webb v. Blakely (court to prepare memo). C 74-287, Mary Larsen v. Ferris R. Kirkham (awaiting filing of memo).

SCHEDULE 3—U.S. DISTRICT COURT FOR THE STATE OF UTAH

WILLIS W. RITTER, CHIEF JUDGE

Description of Status of Pending Cases

Criminal Cases: (Pending)

1968—2 criminal cases (both secret indictments, defendant fugitives).

1973—Cr 40-73—U.S. *v.* Namik Mehmet Gungor (fugitive).

1974—N Cr 74-22—U.S. *v.* Francis C. Lund (Tax Evasion—problem of extradition).

Cr 74-15—U.S. *v.* Carl Robert Taylor & Sherman Ramon McCrary (fugitives).

Cr 74-18—Secret Indictment.

Cr 74-53—U.S. v. William Allen (awaiting sentence).
Cr 74-54—U.S. v. J. Milton Rich (awaiting retrial—hung jury before Judge Halbert in original trial).

1975—6 cases awaiting trial (this includes 2 cases in which the Circuit has stayed all proceedings Cr 75-76 Countryside Farms, et al. Cr 75-120 Lansing and Farley).

1976—15 cases pending, including 3 cases awaiting trial.

Civil Cases: (Pending)

1969

C 327-69—American Oil v. Lawrence S. McMillan (Mandate).

1970

C 21-70—James Jim v. State of Utah (Awaiting hearing on determination of disposition of case and plaintiff's motion for award of attorneys' fees).
C 171-70—U.S. v. Paul E. Reiman (Mandate—property needs to be resurveyed).
C 274-70—Donald Boyde Julander et al v. Ford Motor (Mandate—Retrial).

1971

C 20-71—Walter E. Bronson, et al. v. American Metal Climax (Mandate—Ruling on third party complaint of American Metals v. Silver Bell following filing of briefs).

1973

C 43-73—V-1 Oil v. Pat Griffin (Pretrial Order due May 14, 1976).
C 126-73—Glenda Miera, et al. v. First Security Bank (Master appointed—Ronald N. Boyce).
C 223-73—Cyril L. Jensen, et al. v. John L. Jackson, et al. (Matter stayed pending bankruptcy proceedings in Nevada; otherwise ready for trial).
C 268-73—Rio Vista Oil v. Union Oil (Pretrial Order June 1, 1976).
C 277-73—Je Maintiendrai Club v. Trans-International Airlines (Pretrial Order due June 1, 1976).
C 308-73—Navajo Tribe of Indians v. Rogers C. B. Morton, et al. (Court will not accept settlement—Indians to be brought before court for hearing).
C 357-73—Coca Cola Bottling v. Coca Cola Company (Jury trial after September 1, 1976).
C 367-73—June Vivant et al. v. Trans Delta Oil, et al. (Case Reopened on December 15, 1975—violation of injunction by federal defendants).

1974

C 74-36—Security Investor Protection Corp. v. Equidyne (Matter in Bankruptcy Court).
C 74-64—State of Utah v. Thomas S. Kleppe (Awaiting hearing—ruling on motions for summary judgment following filing of briefs on Apr. 16, 1976).
C 74-74—Alanna L. McMahon v. BYU (Case transferred from Judge Anderson Feb. 9, 1976).
C 74-128—Kenneth Jim Rogers v. Credit Bureau of Salt Lake (Pretrial due).
C 74-148 and 74-155—Douglas Barton v. Montgomery Ward (Mandate—remanded as to matter of dismissal).
C 174-171—Jack L. Wimmer v. USA and Leland G. Stevenson (Awaiting disposition as to USA by court; jury trial result—no cause of action as to defendant Stevenson).
C 74-200—Brad R. Woodward et al. v. Terracor (Pretrial due).
C 74-216—Stephen N. Putnam v. U.S. Dept. of Agriculture, et al. (Pretrial due July 1, 1976).
C 74-261—CIT Leasing v. Stephenson's Inc. (Matter stayed—Chapter 11 bankruptcy).
C 74-284—Erwin Paul Youngreen, et al. v. Stanley Collins, et al. (Awaiting trial).
C 74-287—Mary J. Larsen v. Ferris R. Kirkham, et al. (Case tried; awaiting filing of memos due May 18, 1976).
C 74-296—Arden Robinson v. London Commodity Options (Awaiting trial).

C 74-309—Debry and Hilton Travel Service v. Western Airlines & Sine Enterprises (Motion and Pretrial).
C 74-314—U.S.A. for George Cassity v. R. J. Connors (Motion and Pretrial).
C 74-330—Ray Wardle v. Ute Indian (Awaiting jury trial).
C 74-354—Security Exchange Commission v. Constitution Mint, et al. (Awaiting trial).
C 74-360—Sandra Peart v. Health Industries (Awaiting trial).
C 74-400—Gordon B. Eastman, et al. v. Jerrold R. Morgan (Matter on Appeal).

1975 Cases Pending	*Case filing date*
C 75-14—Robert Rees Dansie v. Pioneer Gen-E-Motor Corp. (Motions and Trial).	Jan. 15, 1975.
C 75-19—Joe A. Gallegos v. Casper A. Weinberger, Sec. Health (Hearing—Ruling of Court [memos filed]).	Jan. 17, 1975.
C 75-27—U.S. Steel Corp. v. United Mine Workers et al. (Pretrial).	Jan. 23, 1975.
C 75-33—Jack Anderson, et al. v. Brimley Bros. Inc. (Hearing—Accounting).	Jan. 28, 1975.
C 75-53—P.B.I. Freight Service v. Gates Rubber Co. et al. (Motions).	Feb. 3, 1975.
C 75-63—Joseph A. Espinosa v. Casper A. Weinberger, Sec. Health (Awaiting Final Papers).	Feb. 13, 1975.
C 75-68—Allen L. Barbieri et al. v. Deseret Mfg. Corp., et al. (Trial).	Feb. 18, 1975.
C 75-87—DMH Co. v. Courtesy Mobile Homes, et al. (Motion)	Feb. 27, 1975.
C 75-88—USA v. Motor Cargo (Matter stayed pending proceedings before ICC, Mar. 25, 1975).	Feb. 27, 1975.
C 75-109—Diana D. Smith v. Prudential Fed. Savings (Pretrial).	Mar. 17, 1975.
C 75-121—Palace Theatre Corp. v. D. W. Harkness et al. (Pretrial).	Mar. 24, 1975.
C 75-124—Theodore E. Glezos et al. v. Mary E. Blackett, et al. (Pending Appeal).	Mar. 25, 1975.
C 75-127—Geraldine Browning Farber et al. v. Walker Bank & Trust (Trial).	Mar. 26, 1975.
C 75-129—Glenn C. Rowland v. Dos Americas, et al. (Awaiting Final Judgment due May 31, 1976).	Mar. 28, 1975.
C 75-133—Security Metals, Inc. v. C. W. "Mac" McIntosh (Application for Default Judgment Hearing).	Apr. 8, 1975.
C 75-143—Innocenti Societa Pallacanestro v. Randall Denton (Pretrial).	Apr. 9, 1975.
C 75-151—Murray First Thrift v. Fireman's Fund, et al. (Pretrial).	Apr. 16, 1975.
C. 75-159—Everett A. Muncy v. Casper A. Weinberger, Sec. Health (Pretrial).	Apr. 22, 1975.
C 75-162—Rulon R. Rich v. Casper A. Weinberger, Sec. Health (Pretrial).	Apr. 23, 1975.
C 75-163—R. W. Sims, et al. v. Moran Tank Co., Inc., et al. (Matter pending appeal).	Apr. 23, 1975.
C 75-166—Dante Menicucci v. Western Pacific RR et al. (Pretrial).	Apr. 29, 1975.
C 75-169—Merle B. Albrechtsen v. William E. Higgins (Pretrial).	Apr. 29, 1975.
C 75-171—Acoustical Contractors, Inc. v. Richard Grant, et al. (Order to Show Cause).	Apr. 30, 1975.
C 75-175—Duvels, Inc., et al. v. Kent Frizzell, Sec. Int. (Trial)	May 2, 1975.
C 75-184—Abbott Laboratories v. Deseret Pharmaceutical Co. (Pretrial).	May 9, 1975.
C 75-186—Teddy A. Hellstrom v. Marilyn Kay Magnuson Anderson Hellstrom (Pretrial).	May 12, 1975.
C 75-192—Groban Supply Co. v. Abbott GM Diesel, Inc. (Pretrial).	May 19, 1975.
C 75-203—Gloria R. Howard v. Dean Witter & Co. (Pretrial)	May 29, 1975.
C 75-207—Nick S. Kalekas v. Casper A. Weinberger, Sec. Health (Awaiting Final Document).	May 30, 1975.

C 75-219—Dairymen Associates, Inc. v. Western General Dairies, et al. (Possible Consolidation).	June 9, 1975.
C 75-220—James C. Allen v. Samuel W. Smith (Trial)	June 11, 1975
C 75-224—Frank Martin, Sr., et al. v. Bradshaw Ford-Mercury, Inc. (Pretrial).	June 13, 1975.
C 75-227—Cox Electronic Systems v. Digital Time Products (Hearing-Default Judgment and Damages).	June 13, 1975.
C 75-233—Ora G. Petersen v. Hayes Servo, Inc., et al. (Pretrial).	June 17, 1975.
C 75-234—Drew D. Jurdan v. Deseret News Publishing (Pretrial).	June 18, 1975.
C 75-249—Jewel M. Mortensen v. Howard H. Callaway, Sec. Army (Pretrial).	June 26, 1975.
C 75-254—Abraham M. Mohammed v. Howard H. Callaway, Sec. Army (Pretrial).	June 30, 1975.
C 75-256—Richard E. Hawkins, et al. v. Dean Witter & Co. (Pretrial).	July 1, 1975.
C 75-261—Melesiu Leka Katoa v. Edward Levi, Attorney General (Pretrial).	July 7, 1975.
C 75-263—Joan E. Wilson v. USA (Pretrial)	July 7, 1975.
C 75-266—Ernest Edward Blake v. Joe Pfoutz, et al. (Jury Trial).	July 9, 1975.
C 75-270—Joseph A. Winkler v. Derwood S. Staples, et al. (Pretrial).	July 9, 1975.
C 75-271—Earl Heizer v. Silver Bullion Exchange, et al. (Trial).	July 10, 1975.
C 75-278—Randolph C. Hackford, et al. v. First Security Bank (Motions and Trial).	July 17, 1975.
C 75-283—Sandra Ann Sullivan v. S. Rigby Wright, et al. (Jury Trial).	July 18, 1975.
C 75-286—John O. Espinoza v. Casper A. Weinberger, Sec. Health (Pretrial).	July 21, 1975.
C 75-290—Ronald E. Faulkner v. Monex International, et al. (Pretrial).	July 23, 1975.
C 75-291—Clyde Erekson, et al. v. Monex International et al. (Pretrial).	July 23, 1975.
C 75-294—Charles L. Peterson v. Secretary of Health, Educ. Welfare (Pretrial).	July 25, 1975.
C 75-299—T. C. Long v. Texaco, Inc., et al (Third Party Complaint filed May 5, 1976).	July 28, 1975.
C 75-305—USA et al. v. Douglas F. Wallace (Order to Show Cause).	July 31, 1975.
C 75-307—Edward Brown Securities v. Jerry V. Strand, et al. (Pretrial).	Aug. 1, 1975.
C 75-313—Continental Account Servicing House v. Trans-American Collections (Motion for Summary Judgement).	Aug. 6, 1975.
C 75-318—USA for Turpin's v. Horace Lloyd, et al. (Pretrial)	Aug. 8, 1975.
C 75-326—Judy Dianne Jorgensen, et al. v. Calvin L. Rampton, et al. (Pretrial).	Aug. 12, 1975.
C 75-331—Joseph E. Dozier v. Kennecott Copper, et al. (Jury Trial).	Aug 14, 1975.
C 75-333—Dale B. Loveridge v. Rondeau Pacifica, et al. (Pretrial).	Aug. 14, 1975.
C 75-346—Ann Richardson v. Steven Smith, et al. (Pretrial)	Aug. 21, 1975.
C 75-348—Brenda Lyle, et al. v. Larry Larsen, et al. (Dismissed—April 1, 1976).	Aug. 21, 1975.
C 75-350—J. Hartley Palmer, et al, v. Tooele Country, et al. (Awaiting Final Settlement Documents).	Aug. 25, 1975.
C 75-355—Gordon Lee Balka, M.D., Martin P. Hoffman, Sec. Army, et al. (Pretrial).	Aug. 26, 1975.
C 75-356—James DeBry, et al. v. Merrill, Lynch, Pierce (Motions).	Aug. 27, 1975.
C 75-358—Trustees of Joint Masonry, et al. v. Alan Longstaff (Pretrial).	Aug. 27, 1975.
C 75-360—Tekton, Inc. v. Robert B. Herzog, et al. (Trial)	Aug. 28, 1975.
C 75-367—Shield Development Co. v. Essex International, et al. (Pretrial).	Sept. 4, 1975.

C 75-370—Holiday Inns, Inc. v. Beth Wride, et al. (Awaiting answers to interrogatories).	Sept. 9, 1975.
C 75-374—Ronald C. Jones v. Richard D. Frost, et al. (Pretrial).	Sept. 10, 1975.
C 75-375—United States Steel v. United Mine Workers, et al. (Pretrial).	Sept. 10, 1975.
C 75-376—John T. Dunlop, Sec. Labor v. Paul W. Cox, et al. (Trial).	Sept. 11, 1975.
C 75-377—James Michael Anderson v. Ernest D. Wright, et al. (Jury Trial).	Sept. 12, 1975.
C 75-380—Margaret Dixon Fowler v. John Harrison Cunningham (Jury Trial).	Sept. 16, 1975.
C 75-381—Radix Corp. v. Paperwork Systems, Inc. (Pretrial)	Sept. 17, 1975.
C 75-385—Mamie Vaughn v. Charles Maxfield Parrish, et al. (Pretrial).	Sept. 19, 1975.
C 75-397—Rocky Mountain Helicopters v. Bell Helicopter et al. (Pretrial).	Oct. 2, 1975.
C 75-398—Johnson Oil Co. v. Federal Energy Administration, et al. (Pretrial).	Oct. 3, 1975.
C 75-399—Perma-Pak, Inc. v. Kephart Communications et al. (Hearing—motion to dismiss).	Oct. 3, 1975.
C 75-403—Melissa Stearman v. Tooele County School District, et al. (On appeal).	Oct. 8, 1975.
C 75-404—Levi E. Mesteth v. Bertha Green, et al. (Hearing—motion to compel answers to interrogatories).	Oct. 10, 1975.
C 75-406—Ardith Haynes v. J. C. Penney Company (Jury Trial).	Oct. 15, 1975.
C 75-408—Ute Indian Tribe v. State of Utah, et al. (Pretrial and Hearing—Objection to Interrogatories).	Oct. 15, 1975.
C 75-410—Dale Pierre v. Ernest D. Wright, et al. (Amended Complaint to be filed).	Oct. 16, 1975.
C 75-411—Richard Albiston, et al. v. Roger S. Kiger, etc. (Entry of appearance for defendant on Apr. 29, 1976).	Oct. 16, 1975.
C 75-412—Samuel James, et al. v. David Franchina, et al. (Amended Complaint to be filed).	Oct. 16, 1975.
C 75-413—Richard Roldan v. Ernest D. Wright, et al. (Hearing—Defendant's motion to consolidate or dismiss).	Oct. 16, 1975.
C 75-414—SEC v. Continental Gold & Silver, et al. (Pretrial)	Oct. 17, 1975.
C 75-415—Marilyn Hockett v. D and RG Railroad, et al. (Pretrial).	Oct. 20, 1975.
C 75-416—George Burch, et al. v. Don A. Stringham, et al. (On appeal).	Oct. 21, 1975.
C 75-423—John E. Price, et al. v. Five-Star Trucking, et al. (Hearing—Order to show cause—dismissal).	Oct. 23, 1975.
C 75-424—Vernon L. Richards, et al. v. E. J. Horton, et al. (Pretrial).	Oct. 23, 1975.
C 75-427—USA et al. v. Jim McClellan (Hearing—Order to show cause).	Oct. 24, 1975.
C 75-430—Lloyd A. Smith, etc. v. GLS Livestock Mgt., et al. (Pretrial).	Oct. 28, 1975.
C 75-433—Northwest Pipeline Corp. v. Beech Holdings, (Motions).	Oct. 30, 1975.
C 75-437—Panelera et al. v. Paneltech Ltd., et al. (Hearing—Objections to production).	Oct. 31, 1975.
C 75-438—William Brian Davis v. David B. Corley, et al. (Amended complaint filed Mar. 16, 1976).	Nov. 3, 1975.
C 75-439—Karen Mayne et al. v. Ernest D. Wright, et al. (Trial).	Nov. 4, 1975.
C 75-440—Leslie James Pearson v. Delmar Larson, (Pretrial)	Nov. 4, 1975.
C 75-442—Parker-Hannifin Corp. v. Poly Seal, Inc., et al. (Awaiting answer to counterclaim).	Nov. 5, 1976.
C 75-448—Louise H. Callahan, etc. v. Arnold Thayer, et al. (Matter to be settled or dismissed).	Nov. 10, 1975.
C 75-449—Roy Velarde v. Kennecott Copper, Inc. (Trial)	Nov. 11, 1975.
C 75-458—Charles R. Lehmer et al. v. Thomson & McKinnon Auchincloss (Pretrial).	Nov. 14, 1975.

C 75-459—Leona M. Muir *v.* David Matthews, Sec. Health, etc. (Oral arguments).	Nov. 17, 1975.
C 75-461—John Boundy *v.* Anaconda, et al. (Motion to dismiss; motion for summary judgment).	Nov. 18, 1975.
C 75-462—Scott Paper Co. *v.* Interstate Contract Carrier (Pretrial).	Nov. 18, 1975.
C 75-466—Midgley Manor, Inc. *v.* John N. Baird, et al. (Pretrial).	Nov. 19, 1975.
C 75-467—Jerry Brewton, et al. *v.* Hon. Calvin L. Rampton, et al. (Amended complaint to be filed).	Nov. 19, 1975.
C 75-469—U.S. *v.* Major Oil Corporation, et al. (Master selected).	Nov. 21, 1975.
C 75-470—USA for Utah Foam *v.* Basin Plastic, et al. (Hearing—motion to dismiss and/or change of venue).	Nov. 21, 1975.
C 75-471—John T. Dunlop, Sec. Labor *v.* Magna Garfield Truck Lines (Hearing—consolidation and/or trial).	Nov. 24, 1975.
C 75-474—Harvey B. Black, et ux *v.* E. Leon Harward (Pretrial).	Nov. 24, 1975.
C 75-476—Matrix Land Co. *v.* Eugene Hunt, et al. (Awaiting answer to cross claim).	Nov. 26, 1975.
C 75-479—USA *v.* Mountain Empire Milk Co. (Motion for summary judgment; motion for default judgment).	Dec. 2, 1975.
C 75-481—Application of Administrator, National Credit Union (Hearing—order to show cause).	Dec. 2, 1975.
C 75-487—Stephen R. Bailey *v.* C. W. Spilker, et al. (Motion to remand; defendant's motion to reconsider motion for summary judgment).	Dec. 4, 1975.
C 75-490—Gregory Backman *v.* Lowell G. Robinson, et al. (Pretrial).	Dec. 5, 1975.
C 75-495—Golden Villa Spa, Inc. *v.* Health Industries, Inc., et al. (On appeal).	Dec. 9, 1975.
C 75-497—Melvin Stewart, et ux. *v.* Kennecott Copper (Pretrial).	Dec. 10, 1975.
C 75-498—LaVerne Murdock *v.* Reserve Oil & Gas, et al. (Awaiting answer to cross claim).	Dec. 11, 1975.
C 75-499—Ross Perri *v.* David Gardner, Sec. Health, etc. (Pretrial).	Dec. 11, 1975.
C 75-511—Mickey O. Purdue *v.* Ralph "Lucky" Dorrity, et al. (Pretrial).	Dec. 17, 1975.
C 75-512—Jewel M. Mortensen *v.* Martin Hoffman, Sec. Army (Pretrial).	Dec. 19, 1975.
C 75-515—USA *v.* Margaret Kreek Jacobsen (Trial)	Dec. 22, 1975.
C 75-517—Pete Grosso *v.* David Mathews, Sec. Health, etc. (Pretrial).	Dec. 22, 1975.
C 75-519—Time Oil Co. *v.* Utah Coke & Chemical Co. (Pretrial).	Dec. 23, 1975.
C 75-520—North American Indian Revivals *v.* Uintah & Ouray Indian. (Hearing—Defendant's motion to dismiss).	Dec. 24, 1975.
C 75-524—Fred J. Laurito *v.* Expressions in Wax, et al. (Motion for default judgment)	Dec. 24, 1975.
C 75-525—Valley Organ & Piano *v.* Kawai Piano (Pretrial)	Dec. 29, 1975.
C 75-528—Neldon Oliver v. David Gardner, Sec. Health (Pretrial).	Dec. 31, 1975.
C 75-530—Professional Freestyle Associates *v.* General Motors et al. (Pretrial).	Dec. 31, 1975.
C 76-1—John T. Dunlop, Sec. Labor *v.* Modular Fabricating (Trial).	Jan. 5, 1976.
C 76-3—Thomas W. Hoopes, David W. Clayton *v.* Willis W. Ritter, et al. (Hearing—motion to disqualify Judge Ritter and motion to dismiss or alternatively summary judgment).	Jan. 5, 1976.
C 76-5—Arthur B. Diaz *v.* Western Pacific RR Co. (Jury Trial).	Jan. 9, 1976.
C 76-6—A & L Concrete Co. *v.* George L. Smith, et al. (Hearing—order to show cause why case should not be dismissed for failure to prosecute).	Jan. 12, 1976.
C 76-7—John E. Blazer *v.* Wadsworth Publishing Co. (Pretrial).	Jan. 12, 1976.

C 76-10—John T. Dunlop, Sec. Labor *v.* Wm. Vriens, Jr., etc. (Judgment signed May 5, 1976).	Jan. 12, 1976.
C 76-12—Roy S. Ludlow *v.* United Systems, Inc. (Hearing—order to show cause why default not taken).	Jan. 15, 1976.
C 76-13—John Buxton et al. *v.* Diversified Resources, Inc. (Hearing—motion partial summary judgment; motion to strike).	Jan. 16, 1976.
C 76-18—Tam Halling *v.* USA (Rule 2255 of T 28 USC)	Jan. 20, 1976.
C 76-22—Clyron W. Mills *v.* Jimmy Dean Meat, et al. (Hearing—motion to dismiss or transfer).	Jan. 23, 1976.
C 76-23—Kenneth M. Flake *v.* William R. Dees (Pretrial)	Jan. 23, 1976.
C 76-24—American National Enterprises, et al. *v.* Sun Classic, et al. (Pretrial).	Jan. 26, 1976.
C 76-27—John T. Dunlop, Sec. Labor *v.* Brent D. Popp, et al. (Pretrial).	Jan. 27, 1976.
C 76-30—Richard L. Christensen *v.* Robert G. Pedersen, et al. (Pretrial).	Jan. 29, 1976.
C 76-32—Ray Cottrell *v.* Bingham Silver Lead Co., et al. (Hearing—order to show cause why case should not be dismissed for failure to prosecute).	Feb. 2, 1976.
C 76-33—M. Peter Heilburn, et al. *v.* Snowbird, et al. (Hearing—motion for consolidation; motion to dismiss).	Feb. 3, 1976.
C 76-35—Samuel Geist Rudy *v.* USA (Section 2255 of T 28 USC).	Feb. 4, 1976.
C 76-40—Bettie Lambson, et al. *v.* Whitfield Transportation (Order to show cause why case should not be dismissed for failure to prosecute).	Feb. 10, 1976.
C 76-41—Thomas Edward Nissalke *v.* Wm. Daniels, et al. (Hearing—motion for more definite statement; motion to dismiss complaint; motion to strike).	Feb. 11, 1976.
C 76-44—Dwayne B. Lovell *v.* Douglas Boulton, et al. (Pretrial).	Feb. 13, 1976.
C 76-46—Howard, Lewis & Peterson *v.* Imperial Trust, et al. (Pretrial).	Feb. 17, 1976.
C 76-51—Rocky Mountain Arms Corp. *v.* Frank Tally et al. (Hearing—motion to dismiss).	Feb. 20, 1976.
C 76-53—Paul Williams *v.* George Latimer, et al. (Hearing—Defendant's motion to dismiss).	Feb. 23, 1976.
C 76-54—Northern Pacific Capital Corp. *v.* Mt. States Resources Corp. (Pretrial).	Feb. 24, 1976.
C 76-55—Audrey Joan Bundy *v.* David A. Kimball, et al. (Pretrial).	Feb. 25, 1976.
C 76-56—Equitable Life Assurance Soc. *v.* Lowell D. Nielson et al. (Pretrial).	Feb. 27, 1976.
C 76-58—Robert D. Sparrow *v.* Roland Anderson, et al. (Hearing—motions).	Mar. 1, 1976.
C 76-60—ICC *v.* Shippers Best Express, et al. (Possible settlement).	Mar. 2, 1976.
C 76-61—ICC *v.* Beehive State Agricultural Co-op, Inc. (Hearing—motion for stay until there is final and ultimate judicial determination of issues raised).	Mar. 2, 1976.
C 76-65—Ludeal Peterson *v.* Denver & Rio Grande RR (Pretrial).	Mar. 4, 1976.
C 76-62—Southern Utah Mineral Dev. *v.* Green Hornet Mining, et al. (Removal from state court).	Mar. 2, 1976.
C 76-73—Wm. Harrison Richins *v.* Buena Vista Poultry et al. (Pretrial).	Mar. 10, 1976.
C 76-74—James A. Baird *v.* David Mathews, Sec. Health (Complaint filed March 12, 1976).	Mar. 12, 1976.
C 76-83—David Curry, et ux. *v.* Educoa Preschools, Inc., et al. (Hearing—order to show cause why case should not be dismissed for failure to prosecute).	Mar. 16, 1976.
C 76-85—SEC *v.* Premier Oil & Gas, Inc., et al. (All parties not yet served).	Mar. 18, 1976.
C 76-87—Harvard G. Foulks *v.* Mrs. Patricia Everett, et al. (Hearing—defendant's motion to dismiss).	Mar. 19, 1976.

C 76-90—Jewel M. Mortensen *v.* Martin Hoffman, Sec. Army (Case not at issue). Mar. 22, 1976.
C 76-91—National Farm Lines *v.* ICC (Amended complaint filed April 15, 1976). Mar. 22, 1976.
C 76-92—Gaynell Reyno etc. *v.* Betty B. Petersen (Hearing—defendant's motion to dismiss). Mar. 22, 1976.
C 76-93—Lake Austin *v.* Operating Engineers Local 3, et al. (Awaiting on answer). Mar. 24, 1976.
C 76-95—Wilbur O. Nelson et al. *v.* USA (Case not at issue)..... Mar. 29, 1976.
C 76-96—A B B Mac Hand-Hand *v.* Donald C. Alexander, Com-IRS (Case not at issue). Mar. 29, 1976.
C 76-98—Paul T. Moore *v.* Burton Lumber & Hardware (Pretrial). Apr. 1, 1976.
C 76-99—Thill Marshall *v.* David Mathews, Sec. Health (Case not at issue). Apr. 5, 1976.
C 76-103—James E. McKay et ux. *v.* Travelers Insurance Co., et al. (Hearing—motion to bring in third party). Apr. 6, 1976.
C 76-104—Wooday B. Searle *v.* Lonnie Johnson (Case not at issue). Apr. 6, 1976.
C 76-105—Lonnie Johnson *v.* Woody B. Searle (Case not at issue). Apr. 6, 1976.
C 76-108—Ersell Harris, Jr. *v.* Sam W. Smith, Warden (Case not at issue). Apr. 7, 1976.
C 76-109—Walter P. Ross, et al. *v.* Ernest D. Wright et al. (Pretrial). Apr. 7, 1976.
C 76-110—Flying Diamond Oil Corp. *v.* Fireman's Fund Ins., et al. (Hearing—defendant's motion to dismiss). Apr. 7, 1976.
C 76-115—Edwin B. Caswell *v.* United Refinery, Inc. (Unable to serve defendant). Apr. 12, 1976.
C 76-117—William R. Kingeman, et ux. *v.* Mt. Spokane Chairlift (No answer filed). Apr. 12, 1976.
C 76-119—R. Kent Christofferson et al. *v.* Producers Livestock (Awaiting filing of answers). Apr. 13, 1976.
C 76-120—Gary L. Skeem *v.* All-Grain Company, et al. (Answer filed May 10, 1976 with counterclaim). Apr. 14, 1976.
C 76-121—Reed H. Christofferson *v.* Producers Livestock Loan Co. (Awaiting filing of answers). Apr. 14, 1976.
C 76-127—Joan A. Moore etc. *v.* Thompson Equipment Co., et al. (Amended complaint filed May 3, 1976). Apr. 21, 1976.
C 76-128—Robert J. Pinder, et al. *v.* Diversified Resources Corp. (No action to date). Apr. 21, 1976.
C 76-129—Do-It Dad Home Improvement Center *v.* Pro Hardware, Inc. (Awaiting filing of answer). Apr. 22, 1976.
C 76-130—Ernest Gene Gane *v.* Joe Fisher, etc. (Awaiting filing of answer). Apr. 22, 1976.
C 76-132—Bill Daniels *v.* Snellen Johnson & Lyle Johnson (No action to date). Apr. 23, 1976.
C 76-134—W. J. Usery, Jr., Sec. Labor *v.* Haynie, Tebbs & Smith (Awaiting filing of answer). Apr. 29, 1976.
C 76-136—Utah Power & Light *v.* Thomas S. Kleppe, Sec. Interior. May 3, 1976.
C 76-140—USA and Ronald L. Jackson *v.* John William Will..... May 5, 1976.

SCHEDULE 4

U.S. DISTRICT COURT FOR THE DISTRICT OF UTAH, WILLIS W. RITTER, CHIEF JUDGE—CASES CLOSED

	Criminal	Civil
Year (1975):		
January	16	9
February	2	8
March	9	18
April	13	26
May	1	8
June	3	4
July	20	27
August	10	17
September	8	8
October	18	10
November	25	16
December	33	26
Total	158	177
Year (1976):		
January	20	26
February	10	35
March	8	31
April	5	22
Total	43	114

SCHEDULE 5

U.S. DISTRICT COURT FOR THE DISTRICT OF UTAH, WILLIS W. RITTER, CHIEF JUDGE– THE ASSIGNMENT OF ALL CASES FILED PURSUANT TO ORDERS OF THE JUDICIAL COUNCIL

	Year	Civil [1]	Criminal [1]
Chief judge	1968	128	131
	1969	213	93
	1970	174	93
	1971	152	83
	1972	186	79
	1973	198	65
	1974	210	122
	1975	265	136
	[2] 1976	68	27

	Year	Civil [1]	Civil [3]	Criminal [3]
Associate judge	1968	122	33	57
	1969	206	63	48
	1970	173	51	41
	1971	152	54	65
	1972	188	73	55
	1973	197	53	50
	1974	196	60	28
	1975	265	71	45
	[2] 1976	67	25	9

[1] Central division.
[2] Apr. 30.
[3] Northern division.

Note: Chief Judge takes all central division criminal ca... Associate judge takes all northern division criminal and civil cases. Central division civil cases are disegnated through assignment cards.

SCHEDULE 6

U.S. DISTRICT COURT FOR THE DISTRICT OF UTAH, WILLIS W. RITTER, CHIEF JUDGE—STATISTICAL DATA

	Arizona		Colorado		Hawaii		Idaho		Kansas	
	1973	1974	1975	1973	1974	1975	1973	1974	1975	1973	1974	1975	1973	1974	1975	1973	1974	1975
Civil cases (excluding land condemnation cases):																		
Number pending 1 to 2 yr	74	245	277	159	254	294	64	85	127	55	70	71	183	273	256	16	16	26
Number pending 2 to 3 yr	22	92	129	54	69	85	23	26	55	11	18	24	110	94	121	0	0	0
Number pending 3 yr and over	9	88	90	24	28	44	17	12	14	8	13	12	62	54	93	0	0	0
Percentage pending 3 yr or more	2.3	8.5	8.6	2.8	2.6	3.2	6.0	3.5	3.0	3.2	4.5	3.9	5.7	8.2	8.6	7.6	6.7	7.6
Median time from filing to disposition (in months)	2.9	8.7	8.8	8.8	8.8	9	12	11	8	10	7.8	8	15	17	11	8	8	7
Median time from issue to trial (in months)	11	11	15	8	12	10	17	.....	.....	10	8	8	15	.....	15	7	6	9
Criminal cases (without fugitive defendants):																		
Number pending 1 to 2 yr	13	36	25	1	6	18	15	18	24	4	4	1	10	10	15	0	0	0
Number pending 3 yr or more	0	3	0	0	0	4	2	0	0	2	2	0	1	2	1	0	0	0
Percentage pending 3 yr or more	0	4.8	5.4	0	0	11.1	6.5	0	0	20	20	0	4.8	6.7	2.4	0	0	0
Median time from filing to disposition (in months)	3.4	3.2	3.0	3.4	3.4	4.0	5.3	6.1	6.3	3.5	3.7	3.5	4.4	4.2	4.0	1.3	1.0	0.8

	Oregon			Washington eastern			Washington western			Wyoming		
	1973	1974	1975	1973	1974	1975	1973	1974	1975	1973	1974	1975
Civil cases (excluding land condemnation cases):												
Number pending 1 to 2 yr	178	179	201	35	45	82	258	263	240	12	16	26
Number pending 2 to 3 yr	51	59	62	19	14	23	56	56	63	2	0	2
Number pending 3 yr and over	8	17	23	15	15	17	22	40	73	5	0	7
Percentage pending 3 yr or more	.9	1.8	2.1	7.2	5.8	5.9	2.2	3.9	6.2	4.7	0	6
Median time from filing to disposition (in months)	9	9	9	8	8	8	10	10	10	.....	.....	.....
Median time from issue to trial (in months)	10	11	10	.....	.....	.....	14	11	15	.....	.....	.....
Criminal cases (without fugitive defendants):												
Number pending 1 to 2 yr	5	5	9	1	3	2	5	8	16	2	0	0
Number pending 3 yr or more	4	1	1	0	1	0	1	3	2	0	0	0
Percentage pending 3 yr or more	26.7	8.3	2.9	0	12.5	13.3	4.2	1.5	5.3	0	0	0
Median time from filing to disposition (in months)	3.9	3.8	4.3	4.2	4.1	3.7	3.6	3.5	3.2	1.3	1.0	0.8

	Montana			Nevada			New Mexico			Utah		
	1973	1974	1975	1973	1974	1975	1973	1974	1975	1973	1974	1975
Civil cases (excluding land condemnation cases):												
Number pending 1 to 2 yr	72	96	71	91	114	111	54	63	41	166	166	240
Number pending 2 to 3 yr	20	35	39	47	49	56	6	10	9	97	97	96
Number pending 3 yr and over	6	10	15	53	38	67	5	7	8	65	65	85
Percentage pending 3 yr or more	1.9	2.8	4.0	12.8	8.6	12.4	1.3	1.7	1.8	7.5	7.5	8.8
Median time from filing to disposition (in months)	8	10	11	9	13	9	6	9	7	13	13	11
Median time from issue to trial (in months)	7	7	8	15	19	.....	3	6	3	11	10	12
Criminal cases (without fugitive defendants):												
Number pending 1 to 2 yr	2	0	0	8	9	11	0	0	0	25	25	17
Number pending 3 yr or more	0	0	1	2	1	5	2	2	1	0	0	0
Percentage pending 3 yr or more	0	0	20	15.4	4.2	16.7	15.4	16.7	11.1	0	0	0
Median time from filing to disposition (in months)	2.0	2.8	2.4	4.8	4.4	4.5	3.0	3.1	3.2	3.4	3.7	3.5

Source: Management Statistics for U.S. District Courts, Administrative Office of the United States Courts (Washington, D.C.).

S. 1130—STATEMENT FOR THE SUBCOMMITTEE ON JUDICIAL ADMINISTRATION, UNITED STATES SENATE JUDICIARY COMMITTEE MAY 19, 1976

Mr. Chairman, members of the committee and staff: I am John J. Flynn, a resident of Utah and a member of the Massachusetts and Utah Bars. Since 1963 I have served as a member of the Faculty of the College of Law at the University of Utah. I have also served as Special Counsel to the Antitrust Subcommittee of the Senate Judiciary Committee from 1969–1970. In addition, I have been a Visiting Professor of Law at the University of Michigan, Georgetown University and the University of Texas. During the coming academic year, I shall serve as a Visiting Professor of Law at Washington University in St. Louis and the University of Pennsylvania in Philadelphia. The views I express here do not represent any of the above institutions, nor do they represent any client or the only United States Judge affected by the proposal pending before the Committee. I speak for myself and my views are not sponsored by or attributable to any other person.

In addition I have appeared as an attorney in courts at all levels of jurisdiction including the United States Supreme Court and as a litigant, witness and attorney in the Court of the present Chief Judge of the United States District Court for the District of Utah. At present, I have no matters pending in that Court nor do I expect to be a party or attorney to any proceedings in Chief Judge Ritter's Court in the near future. My statement here does not represent the views of any client—past, present or potential. I mention all this to avoid the implications that some of the paranoid proponents of this legislation attach to the fact that some of us speak up in defense of the Judge. Recusal motions have become routine in Judge Ritter's Court as the crescendo of unfounded right-wing criticism of him has risen in anticipation of the elections. Many experienced lawyers, Republican, Democrats, and Independents have told me that they would like to testify on this matter, but cannot afford to do so because they will be met with unfounded recusal motions in pending cases by attorneys who will seek to capitalize upon the controversy generated by right-wing critics of Judge Ritter. Moreover, they have ethical concerns about the appearances of defending the Judge in this matter by public testimony when they have matters pending in his Court; ethical constraints which do not restrain political opponents of the Judge since many are not lawyers or they are lawyers who do not regularly appear in his Court. Such a recusal motion is now pending against the President of the Utah State Bar in an antitrust case because he delivered resolutions sponsored by Mr. Robert Hanson attacking the Judge to Judge Ritter, upon the instructions of the State Bar Commission. The motion is based upon a misleading affidavit attacking the integrity of one of the most respected members of our Bar and is premised on a statute which doesn't even apply to the circumstances involved.

Although I believe it is clear that this particular incident is grounds for the serious consideration of taking disciplinary action against the attorney filing the motion and his superiors, the Tenth Circuit has taken the matter under advisement. The practical effects of all this are to tie-up litigation and seriously jeopardize a client's right to counsel—a message not lost on a number of prominent attorneys with a substantial federal practice who would like to testify on this matter. Since I do not regularly represent clients in the Utah Federal Court, nor will I likely do so in the near future in light of my upcoming year-long absence from the state, I am free from the risk of such tactics. I wish to make clear that, although I speak only for myself, my views represent the views of a substantial number of experienced attorneys who are appalled, disgusted, and deeply disturbed at these efforts to politicize a Federal Court. They are not ex-insurance agents with no experience in the Federal Courts or members of the Bar with little respect from their peers or experience in trial courts; but leading members of the Bar with substantial experience in litigation in many courts as well as that of Judge Ritter.

As a lawyer and a law professor, I have a deep and abiding interest in the integrity of the courts, the protection of the independence of the Judiciary, and the defense of the courts from unwarranted attacks or attempts to make political gain from unfounded attacks upon the Judiciary. Over the past few years I have found these commitments have involved me in speaking up against unfounded, political and patently false charges against the sitting Chief Judge of the United States District Court of Utah. I have done so not out of any expected benefit or even friendship for the Judge involved; but out of a deep conviction that the force of law in our society requires that the integrity of

courts be stoutly defended in order to maintain respect for the law as the primary device for settling disputes in society and helping us all to grope toward a better society and human condition.

I do not object to legitimate and factually based criticism of the courts or of particular Judges since the fundamental function of the Judiciary is vital to the process of Justice and the rule of law that we are all subject to. However, there are boundaries to such criticism which, if exceeded, raise serious constitutional issues and questions of the legitimate boundaries of fair criticism. Those boundaries include the making of false and malicious charges, the attempt to exploit unpopular court decisions for political gain, the politicizing of courts to gain an advantage in the litigation process and attempts to coerce a sitting judge out of office by means other than those specified by law and the Constitution. When such criticisms are engaged in by attorneys or public office holders they also raise serious ethical issues and substantial questions about the integrity and motives of those who do so. Even the act of holding these Hearings poses significant constitutional issues and risks to the integrity of this Committee, since witnesses may exceed the boundaries of legitimate criticism and seek to use this forum for purposes beyond the narrow factual issues before the Committee.

The only issue before this Committee is the factual question of whether Judge Ritter, the last sitting Chief Judge "grandfathered" in under the Chief Judge Retirement Act, is performing the duties of Chief Judge—largely administrative duties in supervising the Court. In small districts, (Utah has only two sitting Federal Judges) the administrative duties of Chief Judge are relatively minimal. Case assignment is carried out by lot pursuant to rules established by the Circuit Court and the major responsibilities remaining consist of appointing court personnel and administrative duties of a ministerial character. I have not observed nor do I think anyone can legitimately claim that the United States District Court for Utah is or has been poorly administered. If anything, the Court personnel and the dispatch of its business are outstanding.

The proposal for repealing the Grandfather Clause of the Chief Judge Retirement Act has always puzzled me since I have never heard facts advanced to support such an unusual step. Not understanding the thinking of such proponents nor their motives or particular charges, it is difficult to respond. Proponents of the measure have continually advanced ludicrous and asinine charges that have little or nothing to do with the functions of a Chief Judge. It is difficult to determine whether such scattergun and irrelevant charges are the product of excessive partisan ideology, political expediency for political gain, just plain ignorance of the issues involved or a sincere but pathetic belief in a distorted view of the legal process and the functions of an individual judge within an independent judiciary.

The major criticisms by some of Judge Ritter have not been with his performance as Chief Judge; but with his performance as a Judge. Such matters are not only beyond the subject matter of these Hearings, but they are constitutionally beyond the authority of the Senate. Should these Hearings stray beyond the narrow facts involved in whether the Grandfather Clause should be repealed into the fitness of a particular judge to hold the office of Judge, then it is patently clear that witnesses will be seeking to use this Committee for purposes beyond the power of the Committee. While that might not matter much to some advocates of this bill, I am confident that the members of this Committee do not subscribe to such a casual disregard for constitutional requirements nor will the Committee tolerate such an abuse of the Senate's appropriate role in our scheme of government.

It is also apparent to me that the proponents of this legislation have little regard for the Bill of Attainder clause of the Constitution; a practice so odious that it was the only civil liberty guarantee expressly inserted in the original Constitution. Critics of Judge Ritter seeking this legislation have made numerous public statements which strongly indicate that they seek this legislation in order to punish or discipline Judge Ritter for his performance on the bench—not for any failure to perform the Chief Judge function. In light of the policies enunciated in *United States* v. *Brown*, 381 U.S. 437 (1965), a copy of which is attached, it appears clear to me that the proponents of this bill are seeking to use these Hearings and the passage of this bill to impose an unconstitutional Bill of Attainder by legislatively removing Judge Ritter through a legislative trial from the office of Chief Judge. If that proves to be their objective, it too will be beyond the scope of these Hearings and the power of the Committee; as well as a commentary upon the integrity or intelligence of those who would even

attempt such a tactic. Again, I trust the members of this Committee are above this sort of thing and will not allow the processes of the Senate to be abused for the political gain of some and the personal vendetta of others. To do so, not only infringes upon the policies of the Bill of Attainder Clause but it also destroys that fragile reed upon which courts and all of us must rely to protect the integrity of their processes and the force of law—a due respect for the function of an independent Judiciary.

Thus it is that I question the objective and scope of these Hearings—since again I know of no factual basis upon which it can be shown that Judge Ritter is not carrying out his functions as a Chief Judge. On the one hand, if the Committee permits an inquiry into Judge Ritter's performance as a Judge, it will be trespassing upon constitutional functions of the House of Representatives; while on the other hand, if this Committee passes a bill to remove Judge Ritter from the office of Chief Judge without a factual basis for doing so it will be recommending a law which clearly smacks of a Bill of Attainder. Were this not enough, the issues here extend beyond infringement upon the constitutional prerogatives of the House of Representatives and the Bill of Attainder limitations upon the Congress. The integrity of the Judiciary is involved, the separation of powers is involved, the integrity of the Senate is involved, the functioning of a particular judge is involved, and the risk of utilizing the Senate to politicize the courts is involved.

I know not how to respond to these risks other than being present at the Hearing to listen to testimony, object to charges unrelated to the issues before this Committee and respond to the specifics of any irrelevant charges that may be made. In anticipation of these Hearings, I corresponded with the Committee several weeks ago requesting to be notified of the Hearings and that I be given an opportunity to testify. The only notice I have received have been newspaper accounts of the Hearing obviously provided by press releases from the office of the "Junior" Senator from Utah. Having received no formal notice, invitation to appear, or any idea what testimony may be offered by the proponents of the bill, I can only offer the following observations in light of past comments made by some critics of Judge Ritter in anticipation that they will be renewed in these Hearings.

One such critic, Mr. Robert Hanson, an announced candidate for State Attorney General, has waged a campaign of criticism of Judge Ritter. While there may be reason to believe there is a connection between Mr. Hanson's candidacy for office and his campaign of criticism of Judge Ritter, I prefer to deal with his criticisms on the factual basis of those criticisms. Simply stated, I have heard all of Mr. Hanson's criticisms and have found no factual basis to support them. One such criticism is that Judge Ritter is "arbitrary." While such a criticism is irrelevant to the questions before this Committee, it has been my personal experience that the Judge is not any more or less arbitrary than other strong minded Judges I have observed in other parts of the country. On occasion, I have personally witnessed an arbitrary attitude on the part of the Judge with certain classes of attorneys. Those classes of attorneys have generally consisted of attorneys who are unprepared, incompetent attorneys, attorneys utilizing delay by excessive motion practice, or attorneys making arguments or claims the Judge believed irrational.

This last named class of attorneys is quite vocal and reflects an unusual state of affairs in Utah. There tends to be a deep ideological split in the state. I believe it is fair to categorize Mr. Robert Hanson and many others who are critical of Judge Ritter as extremely conservative, while Judge Ritter is liberal on such matters as civil liberties, labor legislation, minority rights and the Bill of Rights guarantees of the Federal Constitution. The depth of this ideological split and the problems it causes for a Federal Judge in Utah seeking to uphold federal constitutional guarantees and federal law is best demonstrated by the implications for federal court jurisdiction of rather bizarre actions by the conservative Utah Supreme Court—actions defended by Mr. Hanson and his associates in the office of the present Attorney General, Vernon Romney. For example, the Utah Supreme Court has refused to follow binding decisions by the United States Supreme Court interpreting the Fourth Amendment and vacating the death penalties of prisoners in Utah. Most recently, the Utah Supreme Court has held that the Bill of Rights of the Federal Constitution is inapplicable in Utah because the Court believes the Fourteenth Amendment was unconstitutionally adopted or does not incorporate the Bill of Rights in the Fourteenth Amendment limitations upon the activities of the state. (*State* v. *Phillips*, 540

P. 2d 936 (1975).) Such a startling holding (copy attached) based on reasoning long since authoritatively rejected in every other court I know of, indicates the depth of the ideological split in the state and the intellectual "quality" of the conservative side of that split in the legal profession.

Judge Ritter, as the representative of the Federal Judiciary in Utah, often finds himself hearing cases one would not expect to observe being brought or defended elsewhere in the country. Where the State Supreme Court, however, refuses to give effect to federally guaranteed rights and remedies, the Federal Court becomes the focal point of controversy and ideological criticism. Over the years, I have become generally convinced that this ideological division is the root cause of much of the criticism of Judge Ritter principally by those of a conservative political persuasion. They simply do not subscribe to his view of the law; a view generally in accord with interpretations elsewhere in the country. I leave to this Committee's judgment who is irrational, arbitrary, or wrong on the law because of this bizarre state of the law in the state courts. A subsidiary observation is the belief that this kind of criticism usually reaches its peak from such sources on or about the time of state and federal elections, since it apparently makes for good copy in the local media.

Other criticisms from the past I can only deal with summarily. They are all generally irrelevant to the issues before this Committee and the question of whether the Grandfather Clause should be repealed. One such criticism is that Judge Ritter has a high reversal rate. I know not how the reversal rates compares to the total number of cases handled by his Court and not appealed or how it compares to the reversal rate of other relatively activist judges. I have made a study of many of the cases reversed and the quality of the decision-making by Judge Ritter and the Tenth Circuit, since a high reversal rate can be a commentary on the quality of the Circuit or the District Court reversed or both. In many cases there was a division on the interpretation of the facts rather than the law; in others Judge Ritter anticipated constitutional developments (i.e. the right to counsel in parole revocation hearings) before the Circuit did so, and in still others one or the other side interpreted the law differently. As a student of Antitrust law, I can say with some degree of expertise that some of the Circuit decisions in the Antitrust area reversing Judge Ritter are clearly contrary to controlling precedent and the weight of authority while the Ritter opinions generally are in accord with current legal developments. I have attached as an exhibit a recent antitrust case where the Tenth Circuit clearly refused to follow the Supreme Court's standards set down in *United States* v. *Arnold Schwinn* for measuring the legality of vertical market restraints and the weight of the authority in other Circuits in trademark tying cases. Aside from the substantive issues in the case, a reading of the opinions and the reasoning process of both courts—whatever result one thinks appropriate—should indicate to any reasonable expert attorney in the field which Court one might criticize for a lack of judiciousness and expertise of its opinion. Mr. Hanson has tried to make much of reversal statistics without examining the relevance of his statistics or the individual cases involved. While I never saw much relevance in Mr. Hanson's statistics to begin with, I have been struck by the poor quality of the Circuit Court's decisions after reading through Tenth Circuit opinions reversing Judge Ritter. Why this should be so might be a fruitful source of inquiry by this Committee.

A further criticism of Judge Ritter, by some, is his recent dismissal of a federal grand jury that had been sitting for several months investigating Antitrust violations. This, too, raises an interesting issue which I believe causes unjustified and unwarranted criticism of Judge Ritter. He adheres to the view that the right to indictment by a Grand Jury was inserted in the Constitution to protect the innocent by acting as an independent check upon the discretion of the prosecutor. That is, of course, the clear constitutional function of Grand Juries. In recent years, however, Grand Juries and their investigatory powers have been converted to investigatory arms of the prosecutor's office—particularly where the jurors sit for long periods of time. That was obviously the case with the Grand Jury that was dismissed, since a member of that Jury made several public statements to the effect that dismissal of the Jury frustrated "their investigation." In part, this has happened because prosecutors lack other adequate investigatory powers in criminal cases, particularly in the area of complex white collar crimes. Prosecutors thus use Grand Juries as investigative arms of the prosecutor. This is an area which Congress should investigate since the constitutional purpose of Grand Juries is being violated to meet the modern demands of law enforcement in complex and sophisticated white collar crimes. Judge Ritter's position in opposition to long sitting Grand Juries used as investigative tools by prosecutors appears to me a defensible one; the prosecutor's problems where a Judge enforces this clear constitutional limitation on the function of Grand Juries is also an understandable one.

Neither side should be criticized for their position nor should the question become a political football which obscures the serious conflict between constitutional liberties on the one side and the pragmatic and real needs of a prosecutor on the other side. The remedy, of course, must come from Congress by reforming the present system for investigating and prosecuting complex crimes rather than penalizing a federal judge who is discharging his oath of office to uphold the Constitution of the United States. Without belaboring the point, I think we should retain the constitutional function of the Grand Jury as an independent buffer to review the discretion of prosecutors and either provide by law for investigatory grand juries to present proposed indictments to an independent constitutional grand jury or expand by law the criminal investigatory authority of prosecutors along the lines of the Civil Investigative Demand Authority of the Antitrust Division. Criticism of Judge Ritter for dismissing a Grand Jury which had become a tool of the prosecution is simple-minded and naive. It betrays an ignorance of the historical and constitutional function of Grand Juries.

It would unduly prolong this statement to anticipate other and similar criticisms without factual foundation—criticisms I have heard made of Judge Ritter and other federal judges in recent years by many with little understanding of the functions of an independent judiciary. I must reiterate that I believe citizens should feel free to disagree with and criticize court decisions. Such criticism should be responsible, temperate and based on proven facts. When criticism takes place in forums such as this, however, is aimed at a particular judge, and becomes intemperate or without foundation in fact the issues involved become far more complex and serious. Repealer of a Grandfather Clause is a highly unusual step to be taken by Congress and should only be done on the basis of an overwhelming factual record supporting the case. No such case has or could be made here. Repealer of a Grandfather Clause aimed at a single individual should require an even higher standard of proof, since it smacks of a Bill or Attainder, one of the most odious violations of civil liberties known to Anglo-American law. Senate Hearings on the details of a particular judge's performance in office also raise serious separation of powers issues and a significant question about the appropriate allocation of powers between the Senate and the House of Representatives. A further subtle reservation about this proposal, these Hearings and some of the criticism one might expect to hear presented is the substantial risk of politicizing the Judiciary and doing substantial harm to the appropriate functioning of a particular court. Political expediency may justify some things; but surely it does not justify the abuse of the courts to gain political advantage.

Upon an appropriate and dispassionate weighing of all these factors, as well as the absence of a factual record to support any claim that the functions of Chief Judge are not being adequately carried out by the present Chief Judge of the Federal District Court of Utah, I cannot see any basis upon which this Committee can seriously consider, much less report, the proposal before this Committee. Quite frankly, I cannot even understand why a Hearing would be held at all. The integrity of the Senate, the function of an independent judiciary, respect for constitutionally based principles and fairness to a judge who has devoted twenty-five years to the federal judiciary and upholding the Constitution and laws of the United States require summary rejection of the proposal before this Committee. To do any less will only provide further encouragement to those who place little weight upon the value of an independent judiciary, appear to have little respect for fundamental values of the Constitution and seem to have no respect for the functions and integrity of the United States Senate.

Senator BURDICK. Now, the subcommittee will stand in recess at the sound of the gavel of the Chair.

[Whereupon, at 2:15 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

Pursuant to permission given by the subcommittee, the following additional statements were received for inclusion in the hearing

record: from William J. Lockhart, from Judge Willis W. Ritter, and from Robert B. Hansen.

SALT LAKE CITY, UTAH,
June 10, 1976.

Re: Hearing on S. 1130 (by Senator Garn) held May 18, 1976.

HON. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, Senate Committee on the Judiciary, U.S. Senate, Senate Office Building, Washington, D.C.

DEAR SENATOR BURDICK: This supplementary statement is submitted for the record to respond briefly to certain matters suggested by the proponents of S. 1130 in their testimony before your Committee on May 18, 1976.

I heartily endorse your careful introductory statement that this proposal presents only narrow issues—specifically, whether performance of the functions of Chief Judge in the District of Utah is demonstrated to be inadequate, requiring special Congressional intervention to repeal the Grandfather Clause which leaves those functions in the hands of Chief Judge Willis W. Ritter. Despite that properly narrow and almost self-answering statement of the issue posed by S. 1130, it is tempting to go beyond the issues to answer the overdrawn and unsupported statements of the two most heated proponents, Senator Garn and Robert Hanson. It could not have escaped your observation that their statements consisted of repeated assertions of ad hominem personal characterizations of Judge Ritter, without the slightest offering of credible supporting details—and with repeated similar performances before the TV cameras outside the hearing room to promote their real purpose. Particularly offensive was Senator Garn's suggestion that his imagined complaints against Judge Ritter were due to the Judge's "age and whiskey."

One might almost be tempted to think that this effort to "try" Judge Ritter was a puckish attempt to lobby for the Judicial Tenure Act by dramatizing the abuses that can arise in the absence of confidential and procedurally fair proceedings for testing complaints against federal judges. But these obvious plays to the hometown grandstand demonstrate their true political motivations. Although Robert Hanson's post-hearing statement complains that there is "no proof" of his political motivations, he utterly fails to refute my earlier observation that he has repeatedly attempted to "try" his charges in public forums, first before the State Bar Association and now before this Committee, rather than attempting to seek amicable resolution through appropriate requests for inquiry or assistance by appropriate officers of the Bar Association. With a doublespeak that would fit well in 1984, he suggests that prior notice of his grossly overdrawn resolutions seeking formal and public condemnation of Judge Ritter by the Bar Association, which were simultaneously released to the local media, constituted an effort at amicable settlement.

On the merits, of course, the material offered in support by Mr. Hanson, and relied upon Senator Garn, tends mainly to illustrate Hanson's misapprehension of appropriate procedure or of the applicable standards for recusal of a judge, rather than any basis for sanctioning Judge Ritter. Thus, he suggests that the Judge should be censured for his declination to discuss in chambers the merits of Hanson's motions to recoup his failure to make service of process in his private litigation—matters that obviously should be heard in public proceedings on proper notice for hearing on rule day.

Probably most characteristic of the obvious sketchiness and carelessness of Hanson's approach is his failure to recognize both the irrelevance and the incompleteness of his representations concerning Jude Ritter's reversal record. Yet, in the absence of any showing of defiance of clear legal precedent, such an argument is irrelevant on its face, for the essence of the Constitutional independence of federal judges is assurance of freedom for their substantive views—which may result in a high reversal rate for some judges who think independently. Hanson's complaints on this ground are akin to his equally-irrelevant complaints about the judges' constitutional rulings which resulted in orders for release of habeas corpus petitioners: his strong disagreement with the substantive result in those cases is converted, in his mind, to judicial misbehavior. But most revealing of Hanson's careless approach and personal advocacy in this matter is the incompleteness of his purported compilation of Judge Ritter's record. Although the compilation notes that it is limited to analysis of cases reported in the federal reporter system, the significance of that limitation is not acknowledged. He does not recognize that many routine cases are decided by the Circuit under its practice of designating decisions as not for publication;

nor does he consider the fact that the published opinions, therefore, are more likely to reflect strongly-held differences of substantive views.

As your able Chief Counsel so pointedly emphasized at the hearing, virtually none of the argument offered by the current United States Attorney, Mr. Ramon Child, dealt with issues peculiar to the functions of a Chief Judge. With the exception of his concerns about trial authority for a U.S. Magistrate, the matters of which he complained reflect the kinds of tensions between the prosecutive arm and the Courts that the judicial system provides ample opportunity to resolve. But at least until recently, there simply was little disposition on the part of the Justice Department to seek available remedies; and if the issues were clearly drawn with appropriate formal requests from the United States Attorney, there is little reason to suppose that they could not be resolved by negotiation or by appropriate requests for supervisory orders.

At the same time, however, it is essential to recognize that many such matters—particularly the differences over utilization of grand juries—reflect legitimate and strongly-held differences of substantive viewpoint which are wholly inappropriate as a basis for legislative sanctions. Judge Ritter is conscientiously concerned about the dangers that may arise from too close a relationship between prosecutors and members of a grand jury, and the ease with which a prosecutor, with the aid of the investigative agents, can persuade a grand jury to return an indictment. While I have complete faith in the integrity and fairness of the Assistant United States Attorneys who handled grand jury matters during my tenure as United States Attorney, a judge concerned about those very real dangers of the grand jury system may legitimately approach these matters with a much different perspective. That difference of conscientious viewpoint cannot justify imposition of a legislative sanction. Thus, with regard to the grand jury issue, it is appropriate to note that Judge Ritter is far from alone in his view of the need to take great care in averting the dangers of grand juries. Enclosed are two recent editorials from the Salt Lake Tribune endorsing and elaborating Judge Ritter's concerns.

Finally, on the basis of the information available to me, it seemed that Judge Lewis's comments about defiance of the 10th Circuit's orders were also overdrawn. My recollection of your hearing is that he implied there had been frequent or general defiance of Circuit orders, but that he cited only one example; a dispute arising from reallocation of pending cases at the time the other judge on the Utah district bench resigned to accept senior judge status and was replaced by Judge Anderson. Because I represented Judge Ritter in connection with mandamus proceedings before the 10th Circuit in that matter, and because I left him in the lurch by moving to Washington, D.C., at a crucial stage of that proceeding, I feel a special obligation to clarify the record. Thus, the following description reflects my understanding of the circumstances drawn from my representation of the judge until I withdrew as counsel, and from my conversations with Judge Ritter.

Far from evincing an attitude of defiance or disregard of legal authority and principle, that problem was handled wholly as a dispute of legal principle. The difficulty arose because the Circuit rule for allocation of the cases in the District of Utah simply had not provided for reallocation of cases upon the retirement of a sitting judge. It was our view, set forth in extensive and careful detail in two substantial memoranda in the mandamus proceedings before the 10th Circuit, that the rule simply did not allocate those cases and that it was therefore necessary for Judge Ritter to exercise the residual powers of Chief Judge in that narrow situation to provide for proper assignment of those cases. It was made very clear to the Circuit that we regarded the issues presented as substantive questions of importance to the role and function of the federal judiciary; and indeed, it is still my belief that we advanced the more substantial side of the dispute. (Of course that is a difficult question to resolve because the Circuit's opinion did not explain the basis for its disposition of a number of the legal issues presented.)

Throughout my development and presentation of the Judge's position, he made it very clear that it was his intention to seek a petition for writ of certiorari from the Supreme Court if our position was rejected by the Circuit. Pursuant to that purpose, when the Circuit initially ordered the judge to relinquish the single case whose assignment remained at issue, I prepared and filed, on his behalf, a motion for stay of execution of the mandate on that order "pending application to this Court [the Circuit] for rehearing and to the Supreme Court of the United States for a Writ of Certiorari to review the judgments of this Court." Following my submission of a Petition for Rehearing, a new order was

entered denying the request for rehearing, but failing to rule on the application for a stay pending application for certiorari.

Thus, at the time the Circuit's order came down, the Judge had clearly indicated his intention to petition for Certiorari to review the decision and had received no response to his motion to stay the order. Subsequently, and pursuant to his intent legally to contest the validity of the Circuit's order, he held a hearing and made certain rulings in the disputed case. But thereafter, on the very same day, he adopted an earlier telephone suggestion from Mr. Justice White (10th Circuit Justice) by reconsidering his rulings and agreeing with Judges Lewis and Anderson that the dispute should be settled by reassignment of the disputed case to a judge from another district—a resolution which he promptly implemented with orders first staying his rulings, and then rescinding them. Far from reflecting the hardened defiance suggested by Judge Lewis, then, Judge Ritter's approach to this matter involved appropriate and substantial legal steps to contest the matters on the merits and complete disavowal of any action that could have been construed as defiant.

I will be happy to respond to any further inquiries you may have.

Very truly yours,

WILLIAM J. LOCKHART.

Enclosures.

UNITED STATES DISTRICT COURT,
DISTRICT OF UTAH,
Salt Lake City, Utah, June 25, 1976.

Hon. QUENTIN N. BURDICK,
Chairman, Subcommittee on Improvements in Judicial Machinery, Senate Committee on the Judiciary, U.S. Senate, Senate Office Building, Washington, D.C.

DEAR SENATOR BURDICK: Under separate cover, I have returned to you, as you requested, the report of the proceedings, the statements and the exhibits listed on the attached sheet. I wish to express to you my deep appreciation for your courtesy in sending these documents on to me.

I also enclose two (2) copies of a letter dated June 10, 1976 addressed to Honorable Quentin N. Burdick from William J. Lockhart. Mr. Lockhart was present at the hearings. He previously addressed to you the letter referred to in Paragraph 7 of the inventory enclosed. Mr. Lockhart responds to some of the charges leveled by Chief Judge Lewis of the Tenth Circuit. It is especially important that this be included.

Thirdly, I enclose two (2) copies of Statement for the Subcommittee on Judicial Administration, United States Senate Judiciary Committee—S 1130 dated May 18, 1976. This statement was prepared by John J. Flynn, professor of law at the University of Utah Law School, a member of the Massachusetts and Utah Bars, who also served as Special Counsel to the Antitrust Subcommittee of the Senate Judiciary Committee from 1969–1970.

I send on the copies of John Flynn's statement because it is not clear from the portions of the record that I have that his statement has heretofore been submitted to the committee. I am particularly anxious that this be included.

It was kind of you to extend to me thirty (30) days within which to make any response I wished. Because it would be further multiplication of the irrelevant and immaterial, I have no further response. I am grateful for your consideration.

Sincerely yours,

WILLIS RITTER,
Chief Judge.

Enclosure.

THE ATTORNEY GENERAL,
STATE OF UTAH,
Salt Lake City, Utah, May 21, 1976.

Re: S. 1130.
Hon. QUENTIN N. BURDICK,
U.S. Senate, Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR BURDICK: You will recall that after the hearing on Tuesday, May 18, 1976, I inquired concerning the appropriateness of my responding to certain remarks made by Mr. William J. Lockhart. You informed me that I

would be permitted to do so as long as the hearing record is open. This is my response.

1. Prof. Lockhart charged that the subject bill is the result of a political effort on my part to gain publicity. Since Mr. Lockhart offered no proof or facts to support this charge, it is difficult to refute it other than to observe that I certainly have no political influence with Governor Rampton, who is of the opposite political party, nor with the United States Judicial Conference, and both of those parties are on record as favoring this bill. Any matter that affects the public naturally receives attention. I can only assert, and do so sincerely, that I have said and done what I have in this matter because I believe justice is too important to allow personal considerations such as Prof. Lockhart's charges stand in the way of what is right.

2. Prof. Lockhart contended that there had been no efforts to resolve the problems involving Judge Ritter quietly. This is not true. Judge Lewis later detailed numerous such efforts he had made. I personally endeavored to talk privately with Judge Ritter about such problems before filing the special writ in case No. 73–167 (which was granted). Judge Ritter refused to even talk to me about it. See a copy of my affidavit attached dated April 12, 1973, and a copy of the affidavit of Elaine R. Larson, dated April 12, 1973. On December 30, 1975, I served a copy of the foregoing affidavits on Judge Ritter and Professor Lockhart in connection with proposed resolutions to be presented to the Utah State Bar. I endeavored twice again last year to talk to Judge Ritter privately. He refused. I would talk to him privately now if I could.

3. Prof. Lockhart claimed that the charges I made against Judge Ritter had not been communicated to him so that he had a fair opportunity to respond. That is not true. Enclosed please find my affidavit that I served a copy of my statement upon Judge Ritter prior to noon on Monday, May 17, 1976 (it had not been finished until after 5:00 p.m. on Friday, May 14, 1976, so this was the earliest time it could be served when Judge Ritter was in his office). I enclose an affidavit of my secretary which verifies that my affidavit was prepared on May 17, 1976, and a copy sent to Judge Ritter that same date.

It was my impression from the hearing that you and the committee's counsel viewed this bill as special legislation. I submit that it is the *repeal* of special legislation.

Respectfully submitted,

ROBERT B. HANSEN,
Deputy Attorney General.

Enclosures.

AFFIDAVIT

STATE OF UTAH,
County of Salt Lake, ss:

Robert B. Hansen, being first duly sworn upon his oath, deposes and says:

1. He has been requested to appear as a witness before the United States Senate Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery, on May 18, 1976.

2. At 11:15 a.m. on this date I delivered a copy of said statement to Vicky Jolley, secretary to Judge Ritter, and requested that she sign another copy of the same acknowledging receipt of the copy left for the Judge.

3. The said Vicky Jolley read each page of the two copies and then refused to sign that she had received one of them.

Dated this 17th day of May, 1976.

ROBERT B. HANSEN.

Subscribed and sworn to before me this 17th day of May, 1976.

ELAINE R. LARSON,
Notary Public.

My commission expires August 17, 1977.

I hereby certify that on the 17th day of May, 1976, a true and correct copy of the foregoing Affidavit was mailed to Judge Willis W. Ritter, Chief Judge U.S. District Court, 350 South State, Salt Lake City, Utah.

ELAINE R. LARSON.

AFFIDAVIT

STATE OF UTAH,
County of Salt Lake, ss:

Elaine R. Larson, being first duly sworn upon her oath, deposes and says:

1. She is the personal secretary to Robert B. Hansen, Deputy Attorney General.

2. That on the 17th day of May, 1976, she typed to a receipt of service on a copy

of the prepared statement of Robert B. Hansen to the Committee on the Judiciary, Subcommittee on Improvements in Judicial Machinery, as proof of service of the same upon Judge Willis W. Ritter.

3. That after Judge Ritter's secretary refused to sign said receipt according to Robert B. Hansen, she subsequently typed the Affidavit of Robert B. Hansen, dated May 17, 1976, the original of which is attached hereto.

4. That on May 17, 1976, she mailed a copy of said Affidavit to Judge Willis W. Ritter.

Dated this 21st day of May, 1976.

ELAINE R. LARSON.

Subscribed and sworn to before me this 21st day of May, 1976.

MICHAEL L. CRAMER,
Notary Public.

My commission expires: August 18, 1979.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

AFFIDAVIT

(Civil No. C-62-73)

JAMES H. L. LAWLER, PLAINTIFF

v.

FERRON C. LOSEE, ANDREW BARNUM, GEORGE RAMPTON, KENNETH HUISH, RUDY IVERSON, RUDGER C. ATKIN, H. BERNELL LEWIS, NEAL LUNDBERG, A. W. MCGREGOR, WAYNE WHITEHEAD, MONTE BURTON, RUTH DRAPER, JAMES KIMBALL, HOWARD BLOOD, THE ESTATE OF J. RAY MILLS, DECEASED, AND JOHN DOE, KNOWN ONLY BY ACTIONS AND NOT BY NAME, ALL INDIVIDUALLY, DEFENDANTS.

v.

STATE OF UTAH, UTAH STATE BOARD OF HIGHER EDUCATION, PETER W. BILLINGS, CHAIRMAN, THIRD PARTY DEFENDANTS.

STATE OF UTAH,
County of Salt Lake, ss:

Robert B. Hansen, being first duly sworn, deposes and says:

1. I am the attorney assigned by the Attorney General to represent the defendants Ferron C. Losee, Andrew Barnum, George Rampton, Kenneth Huish, and Rudy Iverson in the above entitled case.

2. On March 13, 1973, I wrote a letter to Chief Judge Willis W. Ritter concerning this matter, a copy of which is attached as Exhibit "A". The letter referred to therein is attached as Exhibit "B". It was sent a day prior to Exhibit "A" since I was then in St. George, Utah, consulting with my clients and taking depositions and I called the Attorney General's office in Salt Lake City to request Frank Nelson to order the transcript in question and dictated the letter to Judge Ritter, which was dated that day and mailed on my return the next day.

3. I received no reply to my letter of March 13, 1973, referred to above, so I requested that my secretary, Elaine R. Larson, arrange an appointment for me, through the Judge's secretary, to meet with him and plaintiff's attorney, Jefferson E. LeCates.

4. On March 26, 1973, I wrote Judge Ritter again since I had not received a reply to my letter of March 13, 1973, and my secretary had been unsuccessful in arranging an appointment. A copy of that letter is attached as Exhibit "C".

5. On March 27, 1973, I asked my secretary to call Judge Ritter's secretary as frequently as it appeared in good taste to do so in order to arrange the requested appointment.

6. On April 3, 1973, I received from plaintiff's counsel the Stipulation and Order referred to in my March 26, 1973, letter and directed my secretary to mail it to the Clerk of the Clerk.

7. On April 9, 1973, I went to the clerk's office to see if the Stipulation and Order referred to above were signed and filed and I saw that said document had been received on April 4, 1973, but it was not filed and had not been signed by Judge Ritter.

8. Immediately after learning the facts set forth in the last paragraph, I went to Judge Ritter's secretary's office and requested that I be given an appointment and explained that my concern was that Judge Ritter had not signed the order extending my client's time to plead. Judge Ritter was in at the time and his secretary went into his chambers to discuss my request and returned with the message that the Judge "would look at the file tomorrow."

9. I asked my secretary on April 11, 1973, to continue her efforts to obtain an appointment as I had heard nothing from the Judge nor his secretary since I had been to the latter's office on April 9th.

10. On April 12, 1973, I went to the clerk's office to ascertain whether the order in question had been signed. It was not. The Judge was not in and neither was his secretary. I then requested of the Clerk of the Court a certified copy of the Stipulation and Order referred to above and was advised that no certified copy could be made of it.

DATED this 12th day of April, 1973.

ROBERT B. HANSEN.

Subscribed and sworn to before me this 12th day of April, 1973.

_____,
Notary Public.

Commission expires.

ATTORNEY GENERAL,
STATE OF UTAH,
Salt Lake City, Utah, March 13, 1973.

Re: Melvin T. Smith v. Ferron C. Losee, et. al., Civil No. C 283-69.

Ms. LUCILLE HALLAM,
Certified Shorthand Reporter,
Post Office Building,
Salt Lake City, Utah

DEAR MS. HALLAM: I am writing to you to request a transcript of the remarks of Judge Willis W. Ritter made at the conclusion of the above case which I understand was on the 9th day of September, 1970.

Please send the statement for these services to me and I will see that it is promptly paid.

Please acknowledge receipt of this request and advise as to the time you expect it will take to fill this order.

Yours truly,

FRANK V. NELSON,
Assistant Attorney General.

MARCH 13, 1973.

Re: James H. L. Lawler v. Ferron C. Losee, Andrew H. Barnum, et. al. Civil No. C 62-73.

Hon. WILLIS W. RITTER,
Chief Judge, U.S. District Court,
Salt Lake City, Utah

DEAR JUDGE RITTER: The defendants named above advise me that you made some comments at the conclusion of the case of Melvin T. Smith v. Ferron C. Losee, et. al., civil number C 283-69, on September 9, 1970. They have previously been unsuccessful in their efforts to obtain a transcript of these remarks and have requested our office to obtain that transcript. Accordingly, Mr. Frank V. Nelson has placed that order, a copy of which is enclosed.

I am writing to you at this time to request that you authorize and direct your reporter to prepare this transcript so that this matter might be studied on their behalf.

If you do not feel that it is proper for this transcript to be prepared and supplied to us on behalf of these defendants, I will appreciate your advising me as to when I might consult with you in the presence of plaintiff's attorney concerning this matter.

Yours truly,

ROBERT B. HANSEN,
Deputy Attorney General.

Enclosure.

MARCH 28, 1973.

Re: Lawler vs. Losee, et al.
Hon. WILLIS W. RITTER,
U.S. District Court,
Salt Lake City, Utah

DEAR JUDGE RITTER: Enclosed is a draft of a stipulation and proposed order which I believe is self-explanatory and which Mr. LeCates has indicated he will recommend to his client be signed but he feels he cannot sign it until he has express authority to do so.

As Mrs. Jensen has no doubt told you, I have had my secretary contact her a number of times during the past week to make an appointment with you to discuss the subject matter of this stipulation. It would be very much appreciated if you would fix a time for myself and Mr. LeCates to meet with you on this matter.

Very respectfully yours,

ROBERT B. HANSEN,
Deputy Attorney General.

Enclosure.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

AFFIDAVIT

(Civil No. C-62-73)

JAMES H. L. LAWLER, *Plaintiff, vs.* FERRON C. LOSEE, et al., *Defendants.*

EXHIBIT "D"

STATE OF UTAH,
County of Salt Lake, ss:

Elaine R. Larson, being first duly sworn, deposes and says:

1. I am the legal secretary for Robert B. Hansen, Deputy Attorney General, who has been assigned to represent the principal defendants in the case of James H. L. Lawler v. Ferron C. Losee, et al., United States District Court Case No. C-62-73.

2. On March 21, 1973, the said Robert B. Hansen requested me to call Chief Judge Willis W. Ritter's secretary, Mrs. Jensen, for the purpose of obtaining an appointment for Mr. Hansen and counsel for plaintiff to meet with Judge Ritter concerning the above case. I called Mrs. Jensen and asked her to check with the Judge about an appointment and call me back.

3. On March 27, 1973, I again called and asked about an appointment. Mrs. Jensen said a letter from the Attorney General's office came in the mail but the Judge had not opened it yet. He was on the bench and she would check with him about an appointment and call us.

4. On March 28, 1973, I called Mrs. Jensen again. She informed me that the Judge had opened the letter. However, he did not say anything to Mrs. Jensen about an appointment. She said she would ask the Judge about an appointment when he gave the letter back to her.

5. On April 2, 1973, I called again. She said the Judge had not said anything about an appointment and she could not check with him as he was on the bench.

6. On April 11, 1973, I called Mrs. Jensen again. She mentioned that Mr. Hansen was in yesterday and she got the file out. The Judge was not in. I asked her to call me if she was able to get an appointment date.

7. At no time since my first call of March 21, 1973, has Mrs. Jensen called me concerning this matter.

8. This is being typed by me after 5:00 p.m. on April 12, 1973, and I have not received a call from Mrs. Jensen or anyone else concerning the requested appointment.

Dated this 12th day of April, 1973.

ELAINE R. LARSON.

No. 77-122

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

ROYAL W. SIMS AND THE R. W. SIMS TRUST, *Petitioners*

v.

WESTERN STEEL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DANIEL M. GRIBBON
JOHN P. RUPP
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-122

ROYAL W. SIMS AND THE R. W. SIMS TRUST, *Petitioners*

v.

WESTERN STEEL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 551 F.2d 811. The opinion of the district court granting partial summary judgment to petitioners (Pet. App. 23a-32a) is reported at 403 F. Supp. 450. Other orders and findings of the district court (Pet. App. 21a-22a, 33a-47a) have not been reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1977. By order dated June 11, 1977, Mr. Justice White extended the time for filing a petition

for a writ of certiorari to and including July 21, 1977 (Pet. App. 48a). The petition was filed on the latter date. The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly considered the affirmative defense of release which, despite the district court's determination that it had not been timely raised, had been fully considered by the district court and argued by the parties.

2. Whether the court of appeals' decision should be reviewed in order to afford an opportunity to resolve the "bitter personal controversy" that allegedly exists between the district judge in whose court this case originated (Hon. Willis W. Ritter) and various judges of the court of appeals.

STATEMENT

The complaint in this case charged Western Steel Company ("Western") with having breached an ancillary provision of a license agreement authorizing Western to manufacture and sell a concrete mixer under a patent owned by petitioners. Petitioners also charged Western under 35 U.S.C. § 271(b) (1970) with having induced a third party to infringe the patent. Following proceedings on summary judgment limited to the breach of contract claim and a subsequent bench trial on the inducement claim, the district court entered judgments against Western on both causes of action (Pet. App. 21a-47a). The court of appeals reversed and remanded with instructions to dismiss the complaint (*id.* at 1a-20a).

The evidence before the district court showed that Western had obtained from petitioners in December 1968, in settlement of litigation, a non-exclusive license to manufacture and sell the forward discharging concrete mixer described in United States Patent No. 2,859,949.[1] The license agreement authorized Western to manufacture such mixer units until the inventory it had accumulated pursuant to an earlier agreement with petitioners had been exhausted or until March 12, 1971, whichever occurred earlier (Pet. App. 34a-35a). The agreement also provided that (*id.* at 17a):

> All engineering drawings, plans, designs and specifications covering the Forward Discharge Transit Concrete Mixer within the concept of the Patent Rights of Licensor under this License, shall be[,] upon termination of this License as provided herein, returned to Licensor at the date of termination. * * *

While Western was producing three-axle models under the 1968 license agreement, Rite-Way, Inc. ("Rite-Way"), was manufacturing four and five-axle models of the patented mixer units under a separate license agreement with petitioners (Pet. App. 4a, 36a). Petitioners continued Rite-Way's license through the first several months of 1971, at which time petitioners conveyed to Beta Corporation ("Beta") all of their rights under the patent.[2] Beta in turn issued a license

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[1] United States Patent No. 2,859,949 was issued to J. Jack Willard on November 11, 1958. Petitioners thereafter acquired by assignment all rights, title and interest in or conferred by the patent (Pet. App. 33a-34a).

[2] Although petitioners and Beta did not execute a formal license agreement until February 28, 1972, they made the agreement effective retroactively to June 12, 1971 (Pet. App. 4a).

to Rite-Way, effective July 1, 1971, giving Rite-Way a limited right to manufacture three, four and five-axle mixer units as well as replacement parts. Although the Beta/Rite-Way agreement contained an expiration date of August 31, 1971, Rite-Way continued its manufacturing beyond that date—placing a portion of the proceeds of its sales of the patented mixer units into a royalty reserve (*id.* at 4a).

On September 17, 1971, Western delivered to Rite-Way xerox copies of certain drawings that Western itself had developed in the process of manufacturing three-axle mixer units (Pet. App. 5a).[3] Prior to receiving Western's drawings, Rite-Way had manufactured two complete three-axle units (*id.* at 6a). A division manager of Western testified that he had provided the drawings to Rite-Way to ensure that replacement parts would be available for the mixer units that Western had manufactured and sold before phasing out of the market (*ibid.*).[4] No other evidence was presented concerning the purpose of delivery of the drawings.

Petitioners filed a patent infringement suit against Rite-Way in 1973, seeking to recover royalties for the three, four and five-axle mixer units that Rite-Way had manufactured and sold both before and after

[3] Western charged Rite-Way only the cost of reproducing the drawings, at the rate of approximately $.46 per print (a total of $109.31) (Pet. App. 2a n.*; *see also id.* at 37a). Although petitioners contended originally that Western had given some manufacturing drawings to Rite-Way in 1969, the court of appeals found no evidence to support that contention (*id.* at 5a)—and petitioners apparently have abandoned the claim in this Court (*see* Pet. 7). Western did supply to Rite-Way in 1969, in connection with merger negotiations that ultimately proved unsuccessful, certain customer lists and schedules disclosing Western's assets (Pet. App. 5a, 36a).

[4] See discussion at note 11 *infra*.

petitioners transferred their patent rights to Beta (*see* Pet. 7). Under an agreement subsequently entered into by petitioners and Rite-Way, petitioners agreed to accept $360,000 in full settlement of their accrued royalty claims (Pet. App. 3a).[5] Petitioners also executed a document unconditionally releasing Rite-Way from further liability with respect to any infringement of their patent that may have occurred prior to consummation of the settlement agrement (Pet. 7-8). The United States District Court for the District of Utah entered a judgment evidencing the settlement on February 4, 1974 (*see* Pet. App. 4a).

After having resolved their patent infringement dispute with Rite-Way, petitioners filed the present suit against Western. On December 20, 1974, the district court granted petitioners' motion for partial summary judgment—holding that the "return" provision of the 1968 license agreement (*see* page 3 *supra*) obligated Western to deliver to petitioners all plans and drawings relating to petitioners' patent, whether furnished by petitioners or developed solely by Western (Pet. App. 21a-22a; *see also id.* at 28a-29a). Despite the inducement claim asserted by petitioners, the only matter reserved in the order granting petitioners' motion for partial summary judgment was the determination of damages for Western's breach of the "return" obligation imposed by the 1968 license agreement (*id.* at 22a).

Prior to the hearing on damages, Western moved to dismiss petitioners' action on jurisdictional grounds.

[5] At the time of the settlement agreement, Rite-Way had reserved royalties totaling $491,000 (Pet. App. 3a). Rite-Way presumably owed a portion of those royalties to Beta Corporation for mixer units manufactured after July 1, 1971 (see discussion at pages 3-4 *supra*).

In support of that motion, Western pointed out that petitioners' breach of contract claim was based exclusively upon state law and argued that, before exercising pendent jurisdiction over that claim, the court should have required petitioners to demonstrate that their federal claim, inducement of infringement, was substantial and that their federal and state claims derived from a common nucleus of operative facts. Western contended that petitioners' inducement claim was insufficient to support pendent jurisdiction since, *inter alia,* the evidence showed that Rite-Way had not used Western' drawings and that, in any event, petitioners' release of Rite-Way operated to release Western as well. The failure of petitioners to pursue the inducement claim and of the court to retain jurisdiction over that claim was urged as further evidence that the claim was wholly without merit (*see* Pet. App. 27a).[6] The district court denied Western's motion to dismiss, holding that it had pendent jurisdiction over petitioner's state claim and rejecting Western's contentions concerning the Rite-Way release (Pet. App. 25a-28a). The court entered an order on September 23, 1975, awarding petitioners compensatory damages of $191,426 for breach of contract,[7] $150,000 for conversion of trade

[6] Western also contended that petitioners' inducement claim was without merit because petitioners had conveyed all of their rights under the patent to Beta Corporation prior to the alleged inducement (Pet. App. 25a, 27a).

[7] The court based its award of compensatory damages on petitioner Sims' projection of the profits he would have realized in the market for replacement parts for three-axle mixer units during the period from 1971 through 1974, but for Western's alleged breach of the 1968 license agreement (Pet. App. 31a). Testimony in the record, ignored by the district court, showed that any company having access to completed three-axle mixer units could have copied individual parts and entered the replacement market for them.

secrets (which had not been alleged or argued), punitive damages of $100,000, plus costs and attorneys' fees, yet to be determined (*id.* at 23a-32a).

On October 20, 1975, Western filed a notice of appeal from the district court's money judgment on the state claim and moved to stay any further proceedings in the district court. The court of appeals denied the motion for a stay on February 2, 1976. On March 26, 1976, Western moved in the district court for an order compelling petitioners to provide complete answers to interrogatories it had served and setting trial on the inducement claim at least thirty days after such answers had been received. On April 5, 1976, Western requested a hearing on its pending motions. At the same time, Western requested leave to amend its answer to plead the Rite-Way release as an affirmative defense. The district court denied Western's motion to add the defense of release at the beginning of trial on the inducement claim, which was held on April 28, 1976, on the ground that it was not timely filed (*see* Pet. App. 44a-45a).

On May 8, 1976, the district court entered judgment against Western on petitioners' inducement claim on the ground that Western's delivery to Rite-Way of drawings for three-axle mixer units had induced Rite-Way to infringe petitioners' patent. The court held further that petitioners were entitled to recover from Western their lost profits (in addition to the $441,426 judgment already entered in their favor by reason of such delivery), measured by the total royalties reserved by Rite-Way—or $491,000. The court then trebled that amount, after finding that Western's actions had involved bad faith, and again awarded costs and

attorneys' fees in amounts yet to be determined (Pet. App. 33a-47a).

A unanimous panel of the court of appeals, comprised of Judges McWilliams, Barrett and Doyle, reversed the district court's judgments and remanded with instructions to dismiss the complaint. The court of appeals approved the district court's exercise of pendent jurisdiction over petitioners' breach of contract claim (Pet. App. 15a-16a). It determined, however, that the district court had erred in holding that Western's contractual obligation to "return" to petitioners "[a]ll engineering drawings, plans, designs and specifications covering the Front Discharge Transit Concrete Mixer" encompassed materials developed exclusively by Western as well as those given to it by petitioners (*id.* at 17a-19a). The court pointed out that "[f]rom the legal definitions, there can be a return only if there ha[s] been a prior delivery" and that none of the drawings given to Rite-Way had been supplied by petitioners (*id.* at 19a). The court also noted that the only evidence tending to show that petitioners had suffered injury as a result of not receiving the drawings was petitioner Sims' assertion that he had planned to use them to make replacement parts from which he expected to make a profit (*ibid.*). The court discounted that assertion because, even though Western had retained the originals of the drawings, petitioners had not requested copies until the time of trial (*id.* at 20a). According to the court, "[o]ne gets the impression that this entire claim was the product of afterthought. In the face of this record we find it impossible to given any credence to the adjudication and award" (*ibid.*).[8]

[8] The court of appeals also vacated the award for damages for conversion of trade secrets. The district court had ordered Western to pay petitioners $150,000 for conversion of trade secrets despite the fact that petitioners had not requested such an award (Pet. App. 9a). In vacating the award, the court of appeals stated (*id.* at 10a):

> Since Rite-Way • • • had been in the business [of manufacturing three-axle units prior to receipt of Western's drawings], it is hard to see how these [i.e., the drawings] could have been trade secrets. And because Rite-Way • • • had a license any trade secrets should have been published thereby. That is what a patent and a license agreement are all about. So it is incongruous to talk about trade secrets in this context. • • •

The court also vacated the award of punitive damages for the alleged breach of the 1968 license agreement "[s]ince the record reveals nothing to justify a finding that Western acted maliciously, the manifest weight of the evidence is to the contrary" (*ibid.*).

[9] The court found additionally that the damages awarded to petitioners for Western's alleged inducement of Rite-Way were "so disproportionate as to be shocking" (Pet. App. 11a). As already noted, the district court had measured petitioners' damages for

The court of appeals concluded further that petitioners had failed to show that Western had induced Rite-Way to infringe petitioners' patent. The court noted that liability under 35 U.S.C. § 271(b) arises only when the alleged inducement has been both active and intentional and that petitioners' evidence did not satisfy either of those requirements (Pet. App. 10a). The court pointed out that, [t]o the contrary, there was strong positive evidence that there was no intent whatsoever on the part of Western to induce an infringement" (*id.* at 10a-11a). Alternatively, the court held that, under applicable Utah law, petitioners' failure to reserve any right of action against Western while unconditionally releasing Rite-Way from liability for infringement of their patent precluded recovery against Western premised upon an inducement theory (*id.* at 12a-15a).[9]

ARGUMENT

Petitioners readily concede that a case such as this "would not ordinarily warrant the attention of this Court" (Pet. 5). Indeed, the only portion of the court of appeals' decision specifically challenged involves a simple procedural question—whether the court of appeals properly considered the defense of release despite the district court's determination that Western had not raised that defense in a timely fashion. But since the conclusion of the court of appeals with respect to the defense of release constituted only an alternative basis for its decision, which is fully supported on other unchallenged grounds, there is no reason for this Court to entertain the procedural question presented by petitioners.

It is not, in any event, upon this asserted procedural error that the petition mainly rests but upon a charge that three members of the court of appeals—one of whom sat on the panel in this case—are unable to deal dispassionately with appeals from decisions rendered

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inducement by the total royalties reserved by Rite-Way, or $491,000. The court then had trebled that amount, for a total award of $1,473,000, and ordered Western to pay petitioners' attorneys' fees (*id.* at 45a-47a). The court of appeals pointed out that Rite-Way had obligated itself to pay petitioners $360,000 of the $491,000 reserved by it as royalties pursuant to the 1974 settlement agreement (*id.* at 3a). The court noted further that Western's drawings related only to three-axle mixer units and that, even assuming that Western was responsible to petitioners for all three-axle units produced by Rite-Way after receipt of Western's drawings, petitioners' damages could not have exceeded $18,000 (twelve units at an agreed upon royalty of $1,500 per unit) (*id.* at 3a n.1, 11a). The remaining royalties reserved by Rite-Way were for four and five-axle mixer units, not described in the drawings furnished by Western and manufactured by Rite-Way both before and after it had received Western's drawings (*ibid.*).

by Judge Ritter. Respondent obviously is in no position to offer a comprehensive assessment of the fairness of the treatment accorded litigants in other cases or to respond to Judge Ritter's affidavit in support of the petition (Pet. App. 49a-55a). What is clear, however, is that the court of appeals correctly and fairly resolved the issues presented in this case. That should be the complete answers to petitioners' prayer that this case be used as a vehicle for instructing the court of appeals on the handling of appeals from Judge Ritter's court.

1. Contrary to petitioners' suggestion, the court of appeals did not "bas[e] its decision almost entirely on the so-called release" given to Rite-Way in 1974 (Pet. 18-19). Although the court resolved the release issue adversely to petitioners, it concluded, quite apart from the release, that Western had not breached the 1968 license agreement with petitioners and had not induced Rite-Way to infringe petitioners' patent. More specifically, the court held that the 1968 agreement obligated Western to return to petitioners only those materials, relating to petitioners' patent, originally supplied by petitioners (Pet. App. 17a-19a). Since petitioners had not supplied Western with any such materials, the court correctly concluded that Western had not violated its contractual commitment (*id.* at 19a). With respect to the inducement claim, the court held that petitioners had failed to establish, as required by 35 U.S.C. § 271(b), either that Western actively participated in Rite-Way's alleged infringement of their patent or that Western had acted with the intent to induce an infringement (*id.* at 10a-11a).[10]

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[10] It is settled, of course, that the manufacture and sale of replacement parts for patented products does not constitute patent

Since petitioners have not challenged in this Court the court of appeals' holdings that Western did not breach the 1968 agreement and did not induce infringement of petitioners' patent, holdings that fully warranted its disposition of the appeal, there is no reason for this Court to determine whether the court of appeals properly considered the defense of release.

The release issue would not, in any event, warrant the attention of this Court, even if it were the sole basis of the decision below. The district court's refusal to permit Western to amend its answer before trial expressly to raise the defense of release was inconsistent with the letter and the spirit of the Federal Rules. The court of appeals acted well within the scope of its discretion in correcting that error on appeal."

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infringement. *E.g.*, Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 528-29 (1972); Aro Mfg. Co. v. Convertible Top Co., 365 U.S. 336, 344-46 (1961). Similarly, the furnishing of drawings to an unlicensed person does not amount to inducement to infringe unless the drawings actually are used to manufacture infringing devices and are furnished with the intent that they be so used. *See, e.g.*, Aro Mfg. Co. v. Convertible Top Co., 377 U.S. 476, 488-93 (1964); Knapp-Monarch Co. v. Casco Products Corp., 342 F.2d 622, 626-27 (7th Cir. 1965); Laminex, Inc. v. Fritz, 389 F. Supp. 369, 374 (N.D. Ill. 1974). Since the evidence in the present case showed that Rite-Way had not used Western's drawings in the manufacture of three-axle mixer units (Pet. App. 5a-6a) and the only evidence of intent was that Western had supplied the drawings to Rite-Way to ensure the availability of replacement parts for the mixer units that Western had manufactured and sold (*id.* at 6a), the court of appeals was quite properly "left with the definite and firm conviction that a mistake ha[d] been committed" by the district court (United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). *See also* Commissioner v. Duberstein, 363 U.S. 278, 291 (1960).

[11] In addition to challenging the court of appeals' consideration of the defense of release, petitioners have asserted that one of the

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend an answer or other pleading should "be freely given when justice so requires." The policy judgment subsumed in that mandate, as well as associated provisions of the Federal Rules governing pleading (*e.g.*, Rule 13(f), Fed. R. Civ. P.), is that artificial procedural obstacles to the full and fair consideration of the merits of controversies should be eliminated to the extent possible. As this Court explained in *Foman* v. *Davis*, 371 U.S. 178, 182 (1962):

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; that mandate is to be heeded. * * * In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. —the leave should, as the rules require, be "freely

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questions presented by this case is whether "a court, on appeal, [can] ignore the findings of fact made by the district judge and circumvent the mandate of Rule 52, Fed. R. Civ. P., by substituting its own findings of fact and rulings by reliance upon evidence not a part of the record on appeal" (Pet. 3). Petitioners have failed, however, to identify the "evidence not a part of the record on appeal" to which they are referring. Perhaps this is another way of stating petitioners' objection to the court of appeals' consideration of the Rite-Way release. If petitioners are referring to the court of appeals' consideration of the deposition testimony of the General Manager of Rite-Way, which the district court refused to receive, we submit that the court of appeals correctly concluded that such refusal was unjustified (Pet. App. 6a). Insofar as petitioners are referring to some other item of evidence, or are seeking to raise an issue that we have not perceived, we are content to rely upon the opinion of the court of appeals. It is well established, of course, that Rule 52 does not preclude a court of appeals from reversing the findings of a district court. *See* n. 10 *supra*.

given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

In refusing to permit Western to amend its answer expressly to plead the defense of release, the district court simply stated that Western could have sought leave to amend at some earlier time and that permitting the amendment would have imposed "an unreasonable burden upon the Court and the opposing party * * *" (Pet. App. 44a). It is settled, however, that the mere passage of time between an initial filing and an attempted amendment is not a sufficient reason for denying a motion to amend (*e.g., Spartan Grain & Mill Co.* v. *Ayers,* 517 F.2d 214, 220-21 (5th Cir. 1975), and permitting Western to add the defense of release would not have required the reopening of any portion of the record previously closed or delayed the trial of petitioners' inducement claim.[12]

[12] This case is thus unlike Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971), relied upon by petitioners (Pet. 18). In contrast to the present case, Hazeltine had not sought to raise the defenses of limitations and release until one year after trial. This Court noted that "[t]o have them sustained [Hazeltine's] defenses would have been to deny Zenith the opportunity to prove its recoverable damages—a denial that hardly comports with the letter or the spirit of the Rule 15(a)" (*id.* at 331). Moreover, permitting Zenith to perfect its proof of damages in light of the defenses proffered by Hazeltine would not have eliminated the prejudice to Zenith since that "would, of course, have required reopening of the record and a virtual retrial of the issue of damages" (*ibid.*)—all without any apparent justification for Hazeltine's failure to raise the defenses of limitations and release at an earlier point in the proceedings.

As already noted, well before the trial on the inducement claim the district court and the parties had focused upon the Rite-Way release in connection with Western's contention that petitioners' inducement claim was too insubstantial to provide a predicate for the district court's exercise of pendent jurisdiction over their breach of contract claim. And the district court had fully considered the significance of the release in ruling against Western (Pet. App. 28a). Moreover, it was not until February 1976, when the court of appeals denied Western's motion for a stay of any further proceedings in the district court, that it became apparent that the trial of the inducement claim was likely to proceed concurrently with the prosecution of Western's appeal from the district court's judgment on the breach of contract claim. Western moved expeditiously thereafter to complete its preparation for trial and to amend its answer to add the defense of release. Given these circumstances, the refusal of the district court to allow an amendment to the answer before trial was captious, and the court of appeals' consideration of the defense was entirely proper. While petitioners urged in the courts below that the release did not operate to release Western, they do not urge the court of appeals' contrary conclusion as a ground for review by this Court; their grievance is not only purely procedural but, as has been shown, is without substance.[13]

[13] Although petitioners suggest that the court of appeals' consideration of the release issue denied them "the opportunity to present the numerous defenses that they believe they could properly invoke to demonstrate that the alleged release is neither in law nor in fact what respondent contends" (Pet. 19), they have made no effort to specify what defenses they might have presented. Petitioners have never disputed the validity of the Rite-Way release,

2. Quite candidly, petitioners assert as the primary reason justifying review of this case, not the holding of the court of appeals, but the asserted desirability of using this case as the equivalent of a rulemaking proceeding to inquire into the judicial process in the Tenth Circuit (Pet. 2). According to petitioners, three members of the Court of Appeals (Chief Judge Lewis and Judges Breitenstein and McWilliams) harbor such animosity toward Judge Ritter that "they presume error and reverse, almost as a reflex, any judgment rendered by Judge Ritter (Pet. 15.)."[14] Petitioners propose a variety of measures to deal with the alleged bias of members of the court of appeals: "review, referral to a master, or remand to an unbiased panel of judges from outside the circuit" (Pet. 20).

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although they had ample opportunity to do so in responding to the jurisdictional contentions advanced by Western during the breach of contract phase of the case. Neither have they ever contended that any of the provisions of the release expressly reserve any right of action they otherwise might have had against Western. Thus, even if the court of appeals had proposed to "bas[e] its decision almost entirely on the so-called release" (Pet. 18-19), a remand for further proceedings in the district court would have been meaningless since, under applicable Utah law, the release of an obligor without an express reservation of pre-existing rights of action against a joint obligor operates to release such joint obligor from liability arising out of the matter encompassed by the release. *E.g.*, Matland v. United States, 285 F.2d 752, 755 (3d Cir. 1961); Melo v. National Fuse & Powder Co., 267 F. Supp. 611, 613 (D. Colo. 1967); *see also* Dawson v. Board of Education, 118 Utah 452, 222 P.2d 590 (1950); Green v. Lang Co., 115 Utah 528, 206 P.2d 626 (1949).

[14] The opinion of the court of appeals in this case was written by Judge Doyle for himself and Judges McWilliams and Barrett (Pet. App. 1a). Petitioners have not directed any of their allegations of bias against Judges Doyle or Barrett, and at no time did they request that Judge McWilliams remove himself from the panel.

Petitioners do not claim that the asserted animosity was brought to bear in any specific way in the resolution of this case by the court of appeals. The judge who wrote the opinion and one of the members of the panel, *i.e.*, a majority, are not even among those judges charged with bearing such animosity. No objection on grounds of bias or prejudice was made prior to or during the argument on the appeal. Nothing in the demeanor of the judges on the panel and no passage in the opinion is pointed to as bearing out the serious charges advanced by petitioners. Indeed, the court's resolution of the pendent jurisdiction issue on which it sustained Judge Ritter in less than compelling circumstances (Pet. App. 15a) quite belies the charge that the court of appeals presumes error in his decisions.

Even, however, if it were to be concluded that some action should be taken to relieve such tension as may exist in the Tenth Circuit, review of this case would be a singularly inappropriate way to accomplish such relief. The considerations that would govern any corrective action far transcend the narrow issues in this case. Accordingly, the parties, through briefs, arguments or otherwise, would be of no aid to the Court. To seek resolution within the adversary system of the matters raised by petitioners and supported by Judge Ritter would be to stretch that system far beyond its capability. Should the judges of the court of appeals, for example, be asked to respond to Judge Ritter's affidavit?[15]

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[15] Petitioners' purported showing of bias is based in large part upon data indicating that judgments rendered by Judge Ritter have been reversed on appeal at a rate that exceeds the national average for district courts. The incidence of such appellate

Even if a general review of the relationship between Judge Ritter and certain members of the Tenth Circuit were deemed warranted, that review can be accomplished through the Judicial Conference or through legislative or other action by the Congress. But certainly a matter of such dimension should not be tackled by this Court in the context of a private dispute in which the narrow issue is whether the court of appeals erred in considering a defense, not essential to the court's decision, which had been fully considered by the district court and the parties notwithstanding the refusal of the district court to allow a formal amendment of the answer before trial.

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reversals may stem, of course, from a variety of factors having nothing to do with bias on the part of the reviewing court. Petitioners' related suggestion (*e.g.*, Pet. 16) that a higher than average rate of reversal on appeal creates the "appearance" of bias, which in turn violates the right of appellees to due process, finds no support in decisions of this or any other court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Respondent's opposition obscures the issue that this case presents to the Court. The heated feud between Chief Judge Willis W. Ritter of the U.S. District Court for the District of Utah and various judges on the Tenth Circuit Court of Appeals has created a breakdown in judicial administration in the Tenth Circuit which has in turn served to deny petitioners a fair and impartial hearing on appeal.

The bitter Ritter-Tenth Circuit feud and the problems that this feud has engendered for appellees from Judge Ritter's court are movingly set forth in Judge Ritter's affidavit (Petition Appendix [hereinafter "Pet. App."] at 49a, et seq.). While Judge Ritter's account of the feud and of these problems need not be repeated, it demonstrates why this Court should now intervene.

Respondent's opposition deals largely with the issues of law that were in contention in this case. As petitioners have indicated, petitioners do not seek this Court's review to resolve those issues (although to the extent those issues have been incorrectly decided, the Court of Appeals decision should be vacated). But even as to these issues, respondent has not accurately presented the facts. Two examples make the point:

THE RELEASE ISSUE

First, contrary to respondent's contention that Judge Ritter's findings were properly weighed by the appellate court, the Tenth Circuit ignored Judge Ritter's findings of fact and conclusion of law on the critical issue of the release supposedly given the third party infringer (alleged to cover respondent as well). Respondent attempts to support the appellate court's action by arguing that Judge Ritter was wrong as a matter of law in denying respondent the opportunity to amend its pleadings to include the defense of release; respondent says that the Court of Appeals simply "corrected" that error on appeal. (Respondent's Opposition [hereinafter "Res. Opp."] at 12). However, Judge Ritter's decision was based on three separate conclusions of law,[1] none of which was discussed by the Court of Appeals.

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[1] Where Defendant fails to plead an affirmative defense based upon release, after having been admonished, more than one year

[footnote continued]

Many courts have denied leave to amend when the moving party knew about the facts on which the amendment was based but omitted them from the original pleadings.[2] In this case, the trial court found that there was no reasonable excuse for respondent's neglect in amending its pleadings, and that to allow amendment on the eve of the trial imposed an "unreasonable burden on the court". Indeed, here respondent virtually invited denial of its motion to amend the pleadings by joining it with an equally belated demand for a jury trial as to the release defense. (Pet. App. at 44a). When the motion to amend was made at trial, petitioners offered to withdraw their opposition to the amendment if respondent would drop the companion demand for a jury trial. (Trial Record [hereinafter "Record"], Vol. 1 at pp. 5, 6). This respondent refused to do. The requirement of a jury trial, raised as it was after a year of litigation and at the eve of trial, was viewed by petitioner – and prop-

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prior to trial, by the Court to so amend its pleading, leave will not be granted on the day of trial to add such a defense.

A late request to add an affirmative defense, based upon release, when the party has had knowledge of the affirmative defense two years before the date of trial and before the commencement of the litigation imposes an unreasonable burden upon the Court and the opposing party and refusal to grant leave to so amend the pleadings is within the discretion of the Court.

A two year delayed motion to add an affirmative defense based upon release, coupled with a demand for a jury trial, by a party having knowledge of the defense and having been admonished by the Court more than one year prior to the trial to add the defense, will be denied (Pet. App. at 44a-45a).

[2] E.g., *Head v. Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968 (6th Cir. 1973), *cert. denied*, 416 U.S. 939 (1974); *Komie v. Buehler Corp.*, 449 F.2d 644 (9th Cir. 1971); *See also*, Wright and Miller, *Federal Practice and Procedure*, Civil §1488 (1971).

erly regarded by the trial court – as an abusive stalling tactic.

Despite the fact that Judge Ritter was seemingly well within his discretion in rejecting respondent's untimely request to amend its pleadings, the Court of Appeals did not even discuss Judge Ritter's conclusions of law with respect to that issue. It simply presumed that Judge Ritter was wrong and proceeded to consider, on its own initiative, the excluded defense of release and the excluded release document.

RELEASE DEFENSE SOLE GROUNDS FOR DECISION BELOW

Equally misleading is respondent's suggestion that the Court of Appeals had alternative grounds to deny petitioners' claim for respondent's inducement to infringe petitioners' patent. (Res. Opp. at 11). The Court of Appeals based its decision with respect to this claim *solely* on the improperly considered defense of release. (Pet. App. at 12a). The Court did not hold, as respondent maintains, that "petitioners had failed to establish, as required by 35 U.S.C. §271(b), either that Western actively participated in Rite-Way's alleged infringement of their patent or that Western had acted with the intent to induce an infringement ([Pet. App.] at 10a-11a)." (Res. Opp. at 11). The closest the appeals court came to such a holding was the observation that "the merits of this [inducement to infringe] claim are uncertain and shadowy and *likely* non-existent." (Emphasis added.) (Pet. App. at 11a).

However, the trial court had found the "inducement by Western to infringe Plaintiffs' patent was knowing and willful." (Pet. App. at 41a).[3] Despite the Court

[3] The trial court's Finding of Fact No. 48, in its entirety, is:

The Court finds that the inducement by Western to infringe Plaintiffs' patent was knowing and willful.

[footnote continued]

of Appeals' colorful language, it never set aside the district court's finding of fact as "clearly erroneous" as required by Rule 52, Fed. R. Civ. P. It simply reversed as though it had the discretion of a second trial court.

But the law has been settled by this Court:

> It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. **
>
> We are not given those choices, because our mandate is not to set aside findings of fact "unless clearly erroneous." *U.S. v. National Ass'n of Real Estate Boards,* 339 U.S. 485, 495-596 (1950).

Consequently, the Court of Appeals' decision on the inducement to infringe count rested squarely on that court's construction of the release document and of the release defense. Petitioners' contention that the court was procedurally not privileged to consider an unpleaded affirmative defense is therefore dispositive of the case.

TENTH CIRCUIT FEUD THREATENS RIGHT TO IMPARTIAL JUSTICE ON APPEAL

While these issues are of obvious importance, they are *not* the key to this case. The fact that the Court of Appeals ignored Judge Ritter's findings of fact is merely

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The facts support a finding of intentional infringement by revealing a total disregard for the patent and contractural rights of Plaintiffs. Such a finding is further supported by the fact that Western deliberately withheld the drawings, designs, data, customer lists and specifications from Plaintiffs and deliberately gave that same material to Indiana, the competitor of Plaintiffs, for the known and intended purpose of inducing infringement by Indiana and causing willful harm to Plaintiffs. (Pet. App. at 41a-42a).

illustrative of one of the ways the Court of Appeals has found to discipline a man considered to be a "problem" judge. (*See* Res. App. at 52a). This case must be heard because through it the Court can deal with a problem affecting not only the petitioners but also the many other litigants who are the unwitting victims of the feud raging in the Tenth Circuit. Since 1970, the year Judge David Lewis, one of Judge Ritter's primary detractors, was appointed Chief Judge of the Tenth Circuit, an incredible 67% of all Judge Ritter's appealed decisions have been reversed. (Pet. at 17). As Judge Ritter himself noted in his sworn affidavit, the feud in the Tenth Circuit seriously threatens the ability of appellees from Judge Ritter's court to get fair and impartial justice on appeal. (Pet. App. at 49a). The Judicial Conference may be able to investigate the problem in the Tenth Circuit, but it cannot afford these petitioners the justice that the Tenth Circuit feud has denied to them. Petitioners are at least entitled to a hearing on appeal before judges who are not bent on disciplining a trial judge by rote reversal of his decisions.

As the supervisor of the federal judiciary, the Court has a duty to resolve problems such as the one in the Tenth Circuit. Petitioners were caught in the crossfire in the Tenth Circuit feud and only this Court can grant relief.

CONCLUSION

For the foregoing reasons and for the reasons presented in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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